IN THE

Supreme Court of the United States

COPY

October Term, 1973
No. 73-557

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia.

Brief Amicus Curiae of Charles H. Keating, Jr. in Support of Appellee

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Appellant,

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BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR., IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE

Charles H. Keating, Jr., has a special interest in the general subject of this appeal, having devoted considerable time, money, and effort to assisting law enforcement in combating the spread of obscenity in the Nation; first, as the founder and co-counsel for CDL,[1] and more recently as a member of the Presidential Commission on Obscenity and Pornography.

[1] Citizens for Decent Literature, Inc., now Citizens for Decency Through Law.

Amicus also has a particular interest in the film "Carnal Knowledge" which is the subject of this appeal, having provided legal assistance to the Commonwealth Attorney for the 19th Judicial District of Kentucky in an obscenity case arising out of its exhibition in Maysville, Kentucky.[2] The criminal case in Maysville, Ky., was later compromised with a plea of nolo contendere and a fine of $400. A civil action filed by the Commonwealth Attorney of Maysville, Ky., as Plaintiff, to abate the film "Carnal Knowledge" as a public nuisance, and grounded upon the same evidentiary facts which caused the lodging of the criminal charge in the first instance, was dismissed for lack of prosecution due to the Commonwealth Attorney's inability to serve out-of-state defendants.[3]

Amicus' primary interest in filing this Brief Amicus Curiae is not so much rooted to the abovementioned general concern over the status of the obscenity laws of this Nation, or the merits and infirmities of the specific film "Carnal Knowledge," as it is to Amicus' concern that this Court should have laid before it, in a chronological fashion, the

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[2] The Commonwealth Attorney's letter of Oct. 19, 1971, requested advice and assistance. (See copy of letter at Appendix C, page 3). By way of reply, amicus assigned a group of attorneys to provide services as required (see copy of letter at Appendix C, page 4, which services, as performed, encompassed the preparation of the continuity on "Carnal Knowledge," which appears hereinafter at Appendix A, pages 3 to 84 and the Time-Motion Study at Appendix B, pages 3 to 25.

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[3] The Commonwealth Attorney filed a civil action to abate the film "Carnal Knowledge" as a public nuisance, naming as defendants, out-of-state producers, distributors, etc., including Joseph E. Levine, c/o AVCO Embassy Pictures Corporation, 1301 Sixth Ave., N.Y., NY; Michael Nichols, 1 West 81st Street, N.Y., NY; AVCO Embassy Pictures Corp., a Delaware Corp. c/o Statutory Agent Corporation Trust Co., 277 Park Ave., N.Y., NY.; Motion Pictures Ass'n of America, Inc., c/o General Counsel Sidney Schreiber, 522 Fifth Ave., N.Y., NY; and UCI & IV Corp., a New York Corp., c/o David Stein, 1271 Avenue of the Americas, Room 670, N.Y., NY. In a letter dated March 7, 1973, (See copy at Appendix C, pages 5-6) the Commonwealth Attorney advised Amicus that the criminal case was being compromised on a plea of nolo contendere and a fine of $400.00, and that the civil action was being dismissed under a local rule due to an inability to effect service of process on the out-of-state defendants.

legislative history for Georgia Code Section 26-2105 under attack herein, and the historical facts which provide the background for the criminal conviction which is the subject of this Court's review. Such information came to Amicus' attention in connection with a contract for legal services entered into between the Board of Commissioners of Fulton County and the law firm of Keating, Clancy, Bertsch, and Johnston, (see copy of contract at Appendix D, pages 3 and 4) of which Amicus was a member, wherein the latter firm of attorneys provided Fulton County, Georgia (Atlanta) with special legal services by way of investigation, preparation, and prosecution of obscenity matters, from October 1, 1970 through March, 1971. Those background historical facts appear hereinafter as a part of the "Statement of Facts."

Amicus is satisfied that this Court, given a complete understanding of: (1) the background history to the challenged legislation and, (2) the complete facts which surround the criminal charge and this conviction, will recognize that this case, in a fortuitous fashion, carries with it the solution which will lead this Court out of the wilderness in which it finds itself at the present time in the area of motion picture films. The Georgia Supreme Court's ruling in *Jenkins v. Georgia* 230 Ga. 726, 199 S.E. 2d 183 (Mar 4, 1972) incorporates the very principles espoused by a majority of this Court in its recent obscenity decisions in *Paris Adult Theatre I v. Slaton* 413 U.S. 49 and companion cases on June 21, 1973, and, in fact, further implements those decisions.[4]

[4] Amicus is aware that there are a substantial number of commentators on the American scene who feel that this Court (a) has noted jurisdiction of this case for the specific purpose of placing a limitation on the law expressed in the June 21, 1973, majority decisions (Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, 93 S.Ct.—, et al.) and (b) will reverse the conviction herein. Those expectations, however, where not grounded in a special interest, are superficial assessments made without knowledge of the complete historical facts and the interaction of such facts with the basic gut issue which is created when explicit sexual conduct is depicted on the motion picture screens in any community. As to the latter type of judgment see, in particular, the comments of Professor Alexander M. Bickel on the "Carnal Knowledge" case in his February Reader's Digest article at pp. 116-117.

STATEMENT OF FACTS

INTRODUCTION

The conviction of Jenkins for exhibiting an obscene motion picture film under the specific charge which was read to the jury was *not* the result of chance. Rather, it was the climax to a series of independent, yet integrated and related courses of action undertaken by each of the three separate branches of state government in Georgia - administrative, judicial, and legislative - in that State's determination to outlaw the public depiction of explicit sexual conduct on the motion picture screens in the local communities. That such is a proper area of concern for state government is beyond question. See *Paris Adult Theatre I v. Slaton*, 413 US 49, 37 L.Ed.2d 446 at 458, 459, 93 S.Ct.__(June 21, 1973). That specific objective served as the wellspring for the majority opinions handed down by this Court in the companion obscenity cases on June 21, 1973.

The administration and development of the obscenity law in the Georgia Courts during 1970-1971, together with the action taken by the Georgia Legislature during the period 1970-1971, as explicated hereinafter under the subheading "Statutory Background," clearly demonstrates that on January 13, 1972, Appellant Jenkins had fair notice of what was regarded as criminal conduct when he exhibited "Carnal Knowledge" at the Broad Avenue Cinema in Albany, Georgia. Cf *Rabe v. Washington*, 405 US 313, 31 L.Ed.2d 258, 261, 92 S.Ct. 993 (Mar. 20, 1972). The charging language of the March 6, 1972, Grand Jury indictment itself was quite specific, and was anything but vague. (J.A.8)

Further, Jenkins was *not* an innocent victim, nor is this a case where lack of evidence on the issue of scienter can be urged in the conference room of this Court as a "visceral" grounds for refusing to affirm the conviction. See "Statement of the Case" infra. at page 16. Jenkins exhibited "Carnal Knowledge" with actual knowledge that, four months earlier, the district attorney, as the representative of the administrative branch of government had presented a successful

courtroom challenge to the exhibition of "Carnal Knowledge" at another theater in Albany, Georgia,[5] and was continuing to do so under the combined authority of: (1) a judicial rule of law handed down by the Georgia Supreme Court on Mar. 4, 1971, in *Evans Theatre Corp. v. Slaton*, 230 Ga. 726 180 SE 2d 712 and, (2) a newly enacted statute, Georgia Code Section 26-2105 (b), which became effective on April 1, 1971.

The specific purpose of the 1971 legislation (Georgia Code Sect. 26-2105(b)) was to proscribe the depiction on the motion picture screen of that type of explicit sexual conduct which, if engaged in in public, would amount to "Public Indecency" under Georgia's "common decency" statute. Such legislation was nothing less than a codification of the judicial rule of law followed by both the Fulton County Trial Court in October of 1970 and by the Georgia Supreme Court on Mar. 4, 1971, in the well-publicized "I Am Curious (Yellow)" case (which proscribed similar explicit sexual conduct in that film). See *Evans Theatre Corp., Inc. v. Slaton*, 227 Ga. 377, 180 SE 2d 712, where the Georgia Supreme Court held, at page 715:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code

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[5] See Trial Court Reporter's Transcript (herein referred to as R.T.) on file with this Court as a part of the Record in the Supreme Court of Georgia (as noted in Appellant's Brief at page 8, footnote 7, but not included as a part of the printed Joint Appendix on appeal). The fact that the exhibition had previously been challenged at the Martin Theater was the subject of a stipulation by defense counsel Geer; (R.T. 53).

Q. Now, do you recall whether or not in October Carnal Knowledge was seized from the Martin Theater?

A. Yes, I drew up the search warrant after viewing the film.

Q. Do you know whether or not some time after that the Martin Theater agreed not to show the film unless there was a judicial determination?

A. It would be hearsay.

MR. GEER: I will stipulate that I recall the agreement, Your Honor, and it was admitted and will stipulate to it.

THE COURT: Let the record so indicate.

MR. REYNOLDS: That's all.

> Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. '*There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.*'" (Our emphasis)

In November of 1971, this Court refused to hear an attack on that rule of law. See *Evans Theatre Corp. et al v. Slaton*, petition for certiorari denied in 404 US 950, 30 L.Ed 2d, 267, 92S.Ct 281 (Nov. 9, 1971).

This Court now has before it on review a second decision of the highest Court of the State of Georgia which: (1) affirms the facial validity of the Judicial Rule of Law expressed in the Evans Theatre Corp. case as now codified in 1971 by Georgia Code Ann. Section 26-2105, and which (2) upholds the validity of that statute as applied by both the jury and the Court to an exhibition of the film "Carnal Knowledge" by Bill Jenkins at the Broad Avenue Cinema in Albany, Georgia.

Section 26-2105(b) provides in relevant part as follows:

> "(b) Every person who. . . knowingly exhibits . . .a motion picture. . .containing such conduct (conduct which would be public indecency under section 26-2011 if performed in a public place) . . .shall be guilty of a misdemeanor. . . ."

The term "conduct" which would be public indecency is *specifically* defined[6] as:

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[6] See Miller v. California, 413 US 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607 (June 21, 1973) where this Court said:

> "The basic guidelines for the trier of fact must be:. . (b) whether the work depicts. . ., in a patently offensive way, sexual conduct specificially defined by the applicable state laws. . ." (Our emphasis.)

In his recitation of "Statutory Background" at page 5, Appellant fails to point out that the purpose of the 1968 amendment which created section 26-2011 was "to substitute explicit conduct which falls within its proscriptions for the rather vague 'tending to debauch

(a) an act of sexual intercourse;
(b) a lewd exposure of the sexual organs;
(c) a lewd appearance in a state of partial or complete nudity;
(d) a lewd caress or indecent fondling of the body of another person.

In ruling that Section 26-2105 was facially valid, the Georgia Supreme Court applied the "pari materia" rule of statutory construction. See *Jenkins v. Georgia*, 199 SE2 183 at 184.

> "It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. § 26-2105 is included at its very beginning amply defines obscenity *and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter.* This court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87, 84 SE2d 81. It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question." (Our emphasis.)

In view of the fact that the constitutionality of Georgia Code Ann Section 26-2105 is dependent upon a proper application of the "pari materia" rule of statutory construction, it necessarily follows therefrom that this Court, must review the contemporary historical facts and legislative intent which formed the background for the entire legislative scheme. Further, this Court must place itself in the stead of the Georgia Supreme Court, where it can consider that Court's

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the morals' formerly employed." See Committee Notes to Chapter 26-20 at page 153:

> "26-2011. Public Indecency. - This section substantially restates former § 26-6101, relating to lewdness and public indecency. It substitutes explicit conduct which falls within its proscriptions for the rather vague "tending to debauch the morals" formerly employed. The definition of public place is in line with the "open" lewdness and "notorious" act of public indecency terms of the former statute. The punishment contains no change."

By the terms of the statute, the four specifically defined types of sexual conduct are by definition "patently offensive" as a matter of law.

entire experience in this area of the law, including the Georgia Court's knowledge of prior obscenity litigation and what, as a matter of fact, was and is being introduced onto the motion picture screens of the theaters in Georgia. [7]

A. Statutory Background

On March 21, 1966, this Court handed down its majority decisions in *Mishkin v. New York*, 383 US 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 and *Ginzburg v. U.S.* 383 US 463, 16 L. Ed.2d 31, 86 S. Ct. 942 and its no-clear majority decision (plurality result) in *Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383* US 413, 16 L.Ed.2d 86 S. Ct. 975. Two years later, the Georgia Legislature, in its determination to assure the constitutionality of the Georgia obscenity laws, enacted Georgia Laws 1968, pp. 1249, 1302, which became effective on July 1, 1969, as Georgia Code Ann., Section 26-2101. (See Appendix E at p. 3.) Those sections of the Georgia Laws codified the minority opinion of Justices Brennan, Warren and Fortas in *Memoirs, supra* (since discredited and specifically abandoned in *Miller v. Calif.* 413 US 15, 37 L.Ed.2d 419, 430, 93 S.Ct. (June 21, 1973),) and the rule of law expressed in *Ginzburg v. U.S. supra.* Such sections were operative on the date of the alleged offense herein, Jan 13, 1972. Section 26-2101(b) defines obscenity in terms of a tripartite test as used in the minority opinion of Justices Brennan, Warren and Fortas in *Memoirs, supra.* Sec. 26-2101 (c) codified the rule of law expressed in *Ginzburg v. US., supra* at p. 41, namely, that:

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[7] Phrased differently, it would be quite unfair for this Court, in exercising its "independent constitutional judgment" to weigh in the balance factors not within the confines of the record being reviewed, which might tend to upset the lower court's judgment, while not also considering in the balance trial facts which were not made a part of the joint appendix or other factors which are within the knowledge of the State Court Judiciary, yet which may not be a part of the formal record on review.

"Where an exploitation of interests in titilation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation . . . ."

1. The Legal Problem as Viewed by State Government.

Following the pattern established in other states, the codification of Justice Brennan's tri-partite minority test in *Memoirs* as a part of Georgia law accelerated the slow deterioration which had been taking place in obscenity law enforcement during the past decade. To compound the problem, other issues surfaced and combined to cast a plague upon law enforcement, such as (1) the "prior adversary hearing" issue, put to rest in *Heller v. N.Y.*, 413 US 483, 37 L.Ed.2d 745, 93 S.Ct. 2789, and *Roaden v. Ky.*, 413 US 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (June 25, 1973); (2) the alleged constitutional right of consenting adults to view obscenity in a closed theater arising out of *Stanley v. Georgia*, 394 US 557, 22 L.Ed.2d 542, 89 S. Ct. 1243 (Apr. 7, 1969) and put to rest in *Paris Adult Theatre I v. Slaton*, 413 US 49, 37 L.Ed.2d 446, 456, 93 S.Ct. 2628 (June 21, 1973); (3) whether *Redrup v. New York*, 386 US 767, 18 L.Ed.2d 515, 87 S.Ct. 1414 (May 8, 1967) was to be regarded as a binding constitutional precedent, decided in the negative and put to rest in *Miller v. Calif.*, 413 US 15, 37 L.Ed2d 419, 429 fn.3, 434, 93 S.Ct. 2607 (June 21, 1973); and (4) whether national standards were mandated by the no-clear majority, (plurality result) minority opinion of Justices Brennan and Goldberg in *Jacobellis v. Ohio*, 378 US 184, 12 L.Ed2d 793, 84 S.Ct. 1676 (June 22, 1964), decided in the negative and put to rest in *Miller v. Calif.*, 413 US 15, 37 L.Ed.2d 419 at 436, 438, 93 S.Ct. 2607 (June 21, 1973).

The plague of legal issues described above made it impossible for any prosecutor or municipal attorney to ef-

fectively carry out his law enforcement duties with his regular staff of attorneys. Whenever law enforcement would commence a civil or criminal case in the state courts, the defense, with an unlimited supply of litigation funds generated from the industry's profits, would engage law enforcement on two fronts by carrying the action to the federal courts, which were more favorably inclined toward listening to the federal claims. A Georgia case which documents this unequal struggle is *Central Agency, Inc. v. Brown and McAuliffe, et al.*, 306 F. Supp. 502 (Aug. 26, 1969). There, Hinson McAuliffe, as Solicitor General of the Criminal Courts of Fulton County, Georgia (Atlanta) obtained a search warrant from the Superior Court of Fulton County and on Aug. 13, 1967, pursuant to that authority, seized the film "The Yellow Bird" which was being publicly exhibited at the Central Theater, 104 Whitehall Street, S.W., in Atlanta, Georgia. The search warrant process had been used to obtain the film as evidence for presentation to the grand jury of Fulton County for possible obscenity indictments against persons or corporations responsible for the public exhibition. Instead of contesting the legality of the seizure under the search warrant in the state court, the defense moved into the Federal Court where Federal District Judge Henderson accepted jurisdiction of an original federal lawsuit seeking injunctive relief, and ruled that the state search warrant procedure was constitutionally deficient and that any seizure must be preceded by a state court finding of obscenity in an adversary judicial hearing.

2. The Administrative Answer Given By Fulton County Solicitor-General Hinson McAuliffe.

Faced with the vexatious problems noted above, Solicitor-General McAuliffe obtained authorization from the Board of Commissioners of Fulton County to employ outside counsel to assist him in the investigation, preparation, and prosecution of obscenity matters for the Solicitor General's office. Thereafter McAuliffe entered into a contract with the firm of Keating, Clancy, Bertsch and Johnston, of which Amicus was a member for special legal services from Oct. 1, 1970 -

Mar. 31, 1971 (See Appendix D, pages 3 and 4 and "Interest of Amicus Curiae" *supra*, at page 3). It was agreed at the outset that law enforcement efforts would be concentrated on the motion picture problem in Atlanta, Georgia (which was overrun with hard-core pornography). From this alliance to achieve effective obscenity law enforcement, emerged the starting point in the statutory history of Georgia Code Section 26-2105.

3. **The Judicial Answer in the "I Am Curious (Yellow)" Case - Proscription by Judicial Rule of Law (Civil Injunction against a Public Nuisance).**

At the outset of this program, Hinson McAuliffe, as Solicitor-General of the Criminal Courts of Fulton County, commenced an action in concert with Lewis R. Slaton, the District Attorney of Fulton County, entitled *Lewis R. Slaton and Hinson McAuliffe v. Evans Theater Corp., Inc. dba Loews Grand Theater, et al.*, No. B 59034, in the Superior Court for the County of Fulton seeking an injunction against the exhibition of the motion picture film "I Am Curious (Yellow)" at the Loews Theater. An understanding of the arguments in the "I Am Curious (Yellow)" case is central to an understanding of the statutory history of the Georgia Code Section 26-2105 under attack herein, for it was in that case that the argument was *first* made, in the Georgia State Court system, for the adoption of a *judicial rule of law*, patterned after the reasoning in Justice Burke's majority opinion in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857 (Mar. 26, 1964).[8] Solicitor-General McAuliffe's arguments to the Fulton County Superior Court Judge Shaw in the "I Am Curious Yellow" case were, that if a public act of sodomy in three dimension is a violation of the public policy of the state, being in violation of specific laws which

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[8] Justice Burke's majority opinion in Trans-Lux Distributing Corp. v. Bd. of Regents is discussed hereinafter at page 45 infra. Justice Burke's opinion was derived from Associate Justice Tom C. Clark's concurring opinion in Kingsley International Pictures Corp. v. Regent 360 US 684, 3L.Ed.2d 1512, 1524, 79 S.Ct. 1362 (June 29, 1959).

are designed to proscribe explicit sexual conduct in public, then the public display of such acts, real or simulated, in two dimension by way of motion picture films is *per se* contrary to the same public policy and in violation of the obscenity laws as a matter of law (being a violation of stated community standards). The only evidence offered by plaintiffs in support of the preliminary injunction was the film "I Am Curious (Yellow)" which Superior Court Judge Shaw viewed at the Loew's Theater on Oct. 2, 1970.

In defending against the adoption of the abovementioned *judicial rule of law*, defense counsel in the "I Am Curious (Yellow)" case argued that, if this were so, then the motion picture presentation of simulated murder would be illegal. Solicitor-General McAuliffe's reply pointed out that the argument offered by the opposition was a non sequitur for, while there is no stated law or public policy which prohibits the pictorial portrayal of simulated murder, there is on the other hand, an almost universally recognized law and public policy in civilized societies which prohibits the pictorial portrayal of indecent public conduct, and that is the laws against lewdness.[9]

Upon the conclusion of arguments in the trial court, Superior Court Judge Shaw granted the preliminary injunction and enjoined the showing of "I Am Curious (Yellow)" in Atlanta. On appeal, the Georgia Supreme Court agreed with Solicitor-General McAuliffe's arguments, and *adopted as a judicial rule of law in Georgia*, what is essentially the rationale expressed by *Justice Burke in Trans-Lux Distributing Corp. v. Board of Regents, supra*, discussed hereinafter at page 45. See *Evans Theatre Corp. v. Slaton* 227 Ga. 377,

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[9] Justice Burke's eloquent reply in Trans-Lux Distributing Corp. v. Board of Regents, supra, was at page 863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared over-riding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

180 S.E.2d 712 (Mar 4, 1971) where the Georgia Supreme Court held at page 715:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public."

4. The Legislative Answer - A Confirmation of the Judicial Rule of Law Expressed in the "I Am Curious (Yellow)" case plus Statutory Enactment of Criminal Sanctions.

During the course of the first three months of the legal services contract, several interested citizens and legislators approached Hinson McAuliffe for advice as to obscenity legislation which would compliment the Solicitor-General's efforts in the courtroom. While the advice of special counsel was that it would be inadvisable to effect new legislation at a time when test cases, under existing laws, were being processed against the industry, a copy of a CDL Model Obscenity Statute (see copy at Appendix F, at pp. 3-8), and comments thereon (see copy at Appendix G at pp. 3-16) [10], drafted by attorneys in the firm of Keating, Clancy, Bertsch and

[10] In February of 1971, Solicitor General Hinson McAuliffe had filed with the Georgia Supreme Court a copy of the CDL Model Obscenity Statute (See Appendix F) and a copy of the comments thereon (see Appendix G) as appendices E and F to Appellee's Supplemental Brief in Evans Theatre Corp. dba Loew's Grand Theater v. Lewis R. Slaton and Hinson McAuliffe No. 26,249.

Johnston in March of 1969, was made available to the legislators through Solicitor-General McAuliffe.

Thereafter, Senators Garrand of the 37th District and Walling of the 42nd District filed the major provisions of the abovementioned CDL Model Obscenity Statute as Senate Bill 108. CDL Model Obscenity Statute, Sections 1 through 12, were offered as proposed Georgia Code Annotated Sections 25-2101 through 26-2112. CDL Model Obscenity Statute, Sections 17, 18, 19, 20 and 22 were offered as proposed Georgia Code Sections 26-1113 through 26-2117. CDL Obscenity Statute, Sections 13, 14, 15, 16 and 21 were the only provisions omitted from Senate Bill 108 as originally filed. See copy of Senate Bill 108 as originally filed, at Appendix H, pp. 3-13, and compare the same with the CDL Model Obscenity Statute Appendix F at pp. 3-8. On Jan. 22, 1971, Senate Bill 108, had its first reading in the Senate.

Before Senate Bill 108 was passed to its second reading, advice was sought from Solicitor-General McAuliffe and special counsel as to which provisions of the CDL Model Obscenity Statute were regarded as being of the greatest value in the courtroom struggle. At the time, a recommendation was made by special counsel that, in view of the pending arguments being made in the State Court, legislative codification of CDL's Model Obscenity Statute, Sections 1(a) (public nuisance), 10 (lewd conduct, etc., on the screen, etc.), and 18(a) (contraband) would be of the greatest value. Thereafter, on Mar. 4, 1971, the Senate Committee on the Judiciary offered a substitute bill to Senate Bill 108 (see copy at Appendix I, pp. 3-8) which deleted most of the sections of the CDL Model Obscenity Statute but retained Sections 1(a) (public nuisance), 10 (lewd conduct, etc., on the screen, etc.), and 18(a) (contraband), as proposed Georgia Code Sections 26-2103, 26-2104 and 26-2105. In addition, the CDL scienter provision (Sect. 1(f)) was slightly modified and retained as part of the proposed Georgia Code Section 26-2601(a) as thus amended. Substitute Senate Bill 108 was read for the second time on Mar. 4, 1971, and for the third time on Mar. 5, 1971, at which time it passed the Senate by a 29 to 0 vote. (See Appendix I, at p. 11.)

Substitute Senate Bill 108 was read for the first time in the House on Mar. 5, 1971, for the second time on Mar. 6, 1971, and for the third time on Mar. 9, 1971, at which time it passed the House by a vote of 104-to-4. (See Appendix I, at pp. 11.)

On April 1, 1971, Senate Bill 108 was signed by the Governor of the State of Georgia and became law on that date. (See Appendix J at pp. 3-9.)

Since Georgia Code Section 26-2105 was derived from Section 10 of the CDL Model Obscenity Statute the intent of the Legislature becomes clear beyond doubt. See Comments to the CDL Model Obscenity Statute, at Appendix G, pp. 3-16. Clearly, the intent of the Legislature was to codify the rational applied by Mr. Justice Tom C. Clark in his concurring opinion in *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (June 29, 1959) at 1524:

> "It may be, as Chief Judge Conway said, 'that our public morality, possibly more than ever before, needs every protection government can give.' 4 NY2d at 363, 151 NE2d 204, 205, 175 NYS2d at 50. And, as my Brother Harlan points out, 'each time such a statute is struck down, the State is left in more confusion.' This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray acts of sexual immorality, perversion or lewdness.' If New York's statute had been so construed by its highest court I believe it would have met the requirement of due process.* Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters. For this reason, I would reverse on the authority of Burstyn." (Emphasis ours.)

Justice Clark's opinion was more analytically considered by Judge Burke, speaking for the majority of the New York Court of Appeal in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857 (Mar. 26, 2964), see infra at page 45.

B. STATEMENT OF THE CASE

INTRODUCTION

Contrary to what this Court might be led to believe from Appellant's Statement of Facts (pages 5-7), the legal dispute which the Dougherty County District Attorney had (1) with the type of film which was regularly being exhibited at Jenkins' Broad Avenue Cinema and (2) with Jenkins' exhibition of the film "Carnal Knowledge" at the Broad Avenue Cinema *did not begin* with Jenkins' exhibition of "Carnal Knowledge" at the Broad Avenue Cinema on January 13, 1972. It began many months before that date.

1. The Dougherty County District Attorney Gives Written Notice To The Theaters in May of 1971 of His Intention to Enforce Georgia Code Section 26-2105.

The Georgia Supreme Court having announced the above mentioned judicial rule of law on Mar. 4, 1971, in *Evans Theatre Corp. v. Slayton*, and the Georgia legislature having codified that rule of law in Georgia Code Section 26-2105 (effective on April 1, 1971 upon signature by the Governor) the Dougherty County District Attorney committed himself to enforcing the same, and gave written notice of his intentions to the operators of the local theaters. On May 13, 1971, a news article appeared in the Albany Herald, a copy of which is enclosed herein at Appendix K page 3, announcing that the District Attorney had sent all local theaters the following letter:

> "Pursuant to the instructions of the May 1971 grand jury, I intend to enforce the laws which go into effect on July 1, 1971. I am enclosing a copy of these laws which go into effect July 1, 1971."

2. The District Attorney's Attempt by Civil Process to Stop Jenkins' Conduct as to Other Movies is Frustrated by Defense Attorney Tactics and Federal Interference.

In the face of such notice, Appellant Jenkins herein, as

president of S.W.J. Inc. dba as Broad Avenue Cinema, (See Appendix L page 10) continued to exhibit films which, in District Attorney Reynolds' judgment were in violation of the law. Thereupon, the District Attorney on Aug. 16, 1971, filed a civil action against the Broad Avenue Cinema Theater entitled *Robert W. Reynolds, District Attorney v. S.W.J. Inc.*, Civil Action No. 7296, in the Superior Court for the County of Dougherty, alleging a public nuisance and seeking an injunction against the theater based upon the showing of several films at that theater, such as, "Midnight Plowboy" (July 4, 1971), "The Ravager" (July 14, 1971), "Sweet Bird of Aquarius" (July 12, 1971), "Southern Comfort" (July 22, 1971), and "Tobacco Roody" (July 22, 1971). A copy of the Summons and Complaint in *Robert W. Reynolds, District Attorney v. S.W.J. Inc.*, is attached hereto at Appendix L, pages 3-6.

At the time of filing of the above civil action, District Attorney Reynolds obtained a court order directing S.W.J. Inc. to show cause on Aug. 23, 1971, why the theater should not be temporarily restrained from the continuance of such nuisance. (A copy of such Order appears at Appendix L, page 6.) On Aug. 19, 1971, Appellant Billy R. Jenkins, herein filed a verified answer as president of S.W.J. Inc. dba as Broad Avenue Cinema. (A copy of said Answer appears herein at Appendix L, pages 7-10.)

On Friday, Aug. 20, 1971, one court day before the hearing date on the injunction in the State Court action, (Monday, Aug. 23, 1971) Peter Zack Geer, the same trial counsel who represented Appellant Jenkins in the criminal case below in *Georgia v. Jenkins*, filed a petition for removal in the U.S. District Court for the Middle District of Georgia, Albany Division, effecting the removal of the State Court action to the Federal District Court, ousting the State Court of its jurisdiction to hear the District Attorney's petition for an injunction and to abate a public nuisance, and depriving the District Attorney of his power to enforce the civil remedy in the state court.

A copy of the petition for removal to the U.S. District Court for the Middle District of Georgia, Albany Division, appears herein at Appendix L, pages 11 to 29.

3. The District Attorney's Civil Proceedings on October 12, 1971, Against Another Theater's (Martin Theater) Exhibition of "Carnal Knowledge."

As stated above the first legal proceedings in Albany, Georgia against the exhibition of "Carnal Knowledge" did not begin with Jenkin's exhibition of "Carnal Knowledge" at the Broad Avenue Cinema on Jan. 13, 1972. Such began 3 months earlier when, on Oct. 8, 1971, the Martin Theatres of Georgia, Inc. commenced exhibiting "Carnal Knowledge" at the Martin Twin Theatres in Albany.

The District Attorney viewed the film at the Martin Twin Theatres on Friday, Oct. 8, 1971, and thereafter commenced both criminal and civil proceedings against the Martin Theatres of Georgia, Inc. and its employees. On Oct. 9, 1971, the film was seized under a search warrant and the Martin Twin Theatre manager T. J. Turlington and projectionist T. W. Gordon were charged with two counts each of violating the newly enacted State Obscenity Statute, which specifically prohibited the public display of sexual intercourse and/or lewd sexual acts. In addition, the District Attorney also commenced civil proceedings against the film in Dougherty County Superior Court. (See Albany Sunday Herald news article of Oct. 10, 1971 at Appendix M, page 3.)

When Martin Theatres Inc. of Georgia commenced showing "Carnal Knowledge" at the Martin Twin Theatres on Oct. 8, 1971, a civil action against the Martin Theater (similar to the aforementioned civil action against S.W.J. Inc. dba Broad Avenue Cinema), entitled *Robert W. Reynolds, District Attorney, v. Martin Theatres of Georgia, Inc.*, Civil Action File No. 7381, was already on file in the Superior Court for the County of Dougherty, having been filed on Sept. 8, 1971. In that civil action, District Attorney Reynolds alleged a public nuisance under recently adopted Georgia Code Section 26-2103 which provides as follows:

"The use of any premises in violation of any of the provisions of this chapter shall constitute a public nuisance."

and sought an injunction against the theater based upon the showing of several films at that theater. A copy of the summons and complaint in *Robert W. Reynolds District Attorney v. Martin Theatres of Georgia, Inc.*, Civil Action File No. 7381 is attached hereto at Appendix N, pages 3-6.

At the time of filing the abovementioned civil action on Sept. 8, 1971, the District Attorney had obtained a court order directing Martin Theatres, Inc. of Georgia to show cause on Oct. 13, 1971, why the theater should not be temporarily restrained from carrying on a public nuisance pending the trial of the case (see copy of the Court Order at Appendix N, page 6). When Martin Theatres, Inc. of Georgia commenced exhibiting "Carnal Knowledge" on Oct. 8, 1971, District Attorney Reynolds moved to amend the civil complaint in the State Court to include an allegation that "Carnal Knowledge" had been shown on Oct. 8 and Oct. 9, 1971. On Oct. 12, 1971, the trial court allowed and ordered the amendment re "Carnal Knowledge" to be filed (see copy of the Motion for Leave to Amend and Order at Appendix N, pages 7-8). On the same day, the attorney for Martin Theatres, Inc. of Georgia, filed a motion for summary judgment and set the same for a hearing on Nov. 30, 1971. (See copy of the Motion and Order at Appendix N, pages 9-19).

4. A "Recognition and Agreement" is Reached on Nov. 30, 1971 as to "Carnal Knowledge", Which the District Attorney Attributed to this Court's refusal on Nov. 9, 1971 to Hear the Atlanta, Georgia "I Am Curious (Yellow)" Case.

On Nov. 30, 1971, the District Attorney of Dougherty County and Martin Theatres, Inc. of Georgia, compromised the civil and criminal lawsuits and filed a "Recognition and

Agreement" in the above-entitled civil action No. 7381, (a copy of which appears herein at Appendix N, pages 11 to 14), whereby it was agreed that:

> "The film 'Carnal Knowledge' will not be shown in Dougherty County, Georgia, unless by a final binding, as to Dougherty County, judicial determination the film 'Carnal Knowledge' is found to be 'not obscene.' The determination mentioned shall be by the Georgia Court System."

The settlement between the District Attorney and Martin Theatres, Inc. regarding "Carnal Knowledge" was reported in a news article in the Albany Herald of Dec. 1, 1971, a copy of which appears herein at Appendix N, page 15. There it was reported that the settlement was based upon the U. S. Supreme Court's refusal, three weeks earlier, to review the Georgia Supreme Court's "I Am Curious (Yellow)" decision:

> "Reynolds said the agreement was reached on the basis of a recent Georgia Supreme Court ruling which held the film 'I Am Curious Yellow' to be obscene.
>
> "The United States Supreme Court declined to review the Georgia Court's decision, thereby upholding the action, he said. . . ."

See *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 180 S.E. 2d 712 (Mar. 4, 1971), cert. den. 404 US 950, 30 L.Ed.2d 267, 92 S.Ct. 281 (Nov. 9, 1971).

On the same date an order of dismissal was filed in the civil action, *Robert W. Reynolds, District Attorney v. Martin Theatres of Georgia Inc., Civ No. 7381* (a copy of the dismissal appears herein at Appendix N, page 16). In the criminal action entitled, *Georgia v. Gordon and Turlington*, No. 23877, (see page 18) an order of nol pros was entered. (A copy of the nol pros appears at Appendix N, page 17).

The petition in *Robert W. Reynolds, District Attorney v. S.W.J. Inc.*, No. 7296 was dismissed by District Attorney Reynolds at the same time that the "Recognition and Agreement" as to "Carnal Knowledge" and dismissal was filed in

Robert W. Reynolds v. Martin Theatres, Inc. of Georgia (Nov. 30, 1971). See Appendix L, page 3 and the news article appearing in the Albany Herald of Dec. 1, 1971, a copy of which appears herein at Appendix N, page 15.

5. On Jan. 13, 1972, Jenkins Decides to run the Risk as to "Carnal Knowledge".

Thereafter when, in January of 1972, Appellant Billy Jenkins commenced the exhibition of "Carnal Knowledge" at the Broad Avenue Cinema Theatre, in Albany, Georgia, Lynn Stout, an investigator in the Dougherty County Sheriff's office obtained a search warrant from the Dougherty County Superior Court and executed the same on Jan. 13, 1972. At that time he served a copy of the search warrant on Jenkins (J.A. 15-16) and took possession of the film under the search warrant. On Jan. 14, 1972, the film was shown to the Dougherty County Grand Jury (J.A. 18).

6. An Unfavorable Ruling on the Prior Adversary Hearing Issue Forces the Return of The Copy Seized on Jan. 13, 1972 Under the Ex Parte Search Warrant.

The record before this court fails to reflect that, based upon the evidence obtained through execution of the Jan. 13, 1972 search warrant, four Grand Jury indictments were obtained against the owners, a projectionist, and the ticket seller on an alleged violation of the Georgia Obscenity Law. Subsequent to such seizure, defense counsel made a motion to suppress the evidence in the Dougherty County Superior Court, alleging that the Jan. 13, 1972 seizure under the search warrant was unconstitutional in that a prior adversary hearing had not been held before issuance of the search warrant. Superior Court Judge Asa D. Kelley, Jr. ruled in favor of the theater and ordered that the copy of the film which had been seized on Jan. 13, 1972 was to be returned to the theater owner. (See Albany Herald News Report of Feb. 8, 1972, appearing at Appendix O, page 3.)

7. On Feb. 9, 1972, Jenkins Resumes the Showing of "Carnal Knowledge." Following Jenkin's Refusal to Present the Film at a Civil Prior Adversary Hearing, the Film is Seized Again Under A Search Warrant and Jenkins is Thereafter Arrested.

Thereafter, when the Broad Avenue Cinema announced that it was going to reschedule "Carnal Knowledge" for an engagement at the Broad Avenue Cinema, beginning on Wednesday, Feb. 9, 1972 (see Albany Herald News Article, dated Feb. 8, 1972, a copy of which appears herein at Appendix 0, page 3). District Attorney Robert Reynolds, on Monday, Feb. 7, 1972, filed a petition for an adversary hearing on behalf of Investigator Lynn Stout with Dougherty County Superior Court Judge Asa D. Kelley, Jr., and, later, with the City Court. At a hearing in the City Court on Wednesday, Feb. 9, 1972, Charles Hatcher, attorney for Billy Jenkins, did not produce the film and contested the power of the City Court to conduct the hearing. City Court Judge William T. Jones denied the motion on the grounds that if the Court had the power to sign search warrants then he also had the right to conduct the adversary hearing. Thereupon, City Judge William T. Jones signed an order authorizing the seizure of the film (see Albany news article of Feb. 9, 1972, a copy of which appears herein at Appendix 0, page 4.)[11]

[11] Appellant's brief is in error when it suggests on page 6, paragraph 2 that the film which was shown to the jury on Mar. 22, 1972 was the one which was seized on Jan. 13, 1972, and when it suggests at footnote 3 that "The seizure of the film and its continued detention throughout the proceedings below clearly violated both First and Fourth Amendments standards. Heller v. New York, 413 US 483 (1973); Roaden v. Kentucky, 413 US 496 (1973). However, Appellant did not object to the introduction of the film as evidence and, accordingly, the seizure is not before this Court on this appeal. . . ." The copy of "Carnal Knowledge" that was seized on Jan. 13th was returned to the theatre under Judge Kelley's erroneous ruling that the January 13, 1972 seizure was unconstitutional because of a failure to provide a prior adversary hearing (See page 21 supra). It should be noted that it was only when Jenkins thereafter insisted upon again showing the film that (1) a second search warrant was applied for, and executed on Feb. 9th and that (2) Jenkins was arrested on Feb. 10, 1974 for a violation of section 26-2105.

Thereafter, on the same day, Sheriff investigator executed the search warrant and seized a second copy of the film (see Albany Herald News Report of Feb. 10, 1972, a copy of which appears herein at Appendix 0, page 5). On the following day, Lynn Stout executed an affidavit and a warrant of arrest was issued charging Billy Jenkins with a violation of Georgia Code Section 26-2105 (J.A. 5, 6).

The film was shown to the March Term, 1972 Grand Jury which returned its indictment on Mar. 6, 1972. In the charging language of the Grand Jury indictment it was alleged in general terms that Jenkins was charged with the offense of "distributing obscene material" and more specifically that he did:

> "Knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd carress or indecent fondling of another person. . . ."

On Monday, Mar. 20, 1972, Superior Court Judge Asa D. Kelley Jr. overruled Jenkins demurrer to the Grand Jury indictment (J.A. 9) as to each and every ground without comment. (J.A. 13).

8. The First Criminal Trial of Jenkins to an 11 Men, 1 Woman Jury ends on Mar. 21, 1972 After 10 Hours of Deliberation With the Jurors split 11-1.

On the same day (Mar. 20, 1972) the first trial of Jenkins was conducted in the Dougherty County Superior Court with the selection of the jury being conducted from approximately 9:30 A.M. until shortly after Noon, at which time the jury of eleven men and one woman was chosen to try the cause (see News Report of Albany Herald of Mar. 20, 1972, a copy of which appears herein at Appendix 0, page 6). Evidence was presented and the cause was submitted to the jury. Thereafter, on Monday, Mar. 20th and Tuesday, Mar. 21st the jury considered the matter for approximately ten hours without rendering a verdict. On Mar. 21, 1972 at approxi-

mately 12:15 P.M. a mistrial was declared by Superior Court Judge Asa D. Kelley Jr., with the jury deadlocked 11-to-1 (see Albany Herald Examiner, of Mar. 21, 1972, a copy of which appears herein at appendix 0, page 7).

9. The Second Criminal Trial of Jenkins Commences the Next Day (Mar. 22, 1972) to an all Male Jury.

On the following day, Wednesday, Mar. 22, 1972, the case was retried in the Dougherty County Superior Court a second time to an all male jury (see newspaper report of Albany Herald of Mar. 22, 1972 a copy of which appears herein at Appendix 0, page 8).

STATE OF GEORGIA: CASE IN CHIEF

Lynn Stout testified for the State of Georgia and stated that he was an investigator with the Dougherty County Sheriff's Department; that he knew Billy Jenkins and had talked to him many times; that "He is running the theatre. I think his formal title would be manager"; that he had gone to the theatre on Jan. 13, 1972 (J.A. 15) and at that time "seized with a search warrant the movie entitled 'Carnal Knowledge' " which had been playing there on that date; that at that time Billy Jenkins was there and that he had shown the search warrant papers to him and that thereafter they had proceeded upstairs where the film was rewound and seized by him at which time he handed Billy Jenkins a copy of the search warrant papers (J.A. 16).

On cross-examination, Stout stated that at the time of service of the search warrant approximately 125 to 150 people were present in the theater; that he assumed that Billy Jenkins ran the theatre because "he is the man that gave all the orders to rewind the film and to have the people leave the theatre and etc.;" "he was in charge at the time that I made the seizure." Stout stated that he had seized "Carnal Knowledge" three or four times in Atlanta, Georgia, and that he had drawn the search warrant for the first seizure at the Martin Twin Theatre; that he had viewed it before and also on Feb. 14, 1972, when it was shown to the Grand Jury (J.A. 18).

Upon completion of investigator Stout's testimony, the District Attorney offered in evidence an affidavit signed by Billy Jenkins which stated that he was the president of that theatre. The District Attorney also offered into evidence the copy of the film "Carnal Knowledge" which investigator Stout testified to, as having been seized by him. The court retired for lunch.

The jury returned to the courtroom at 12:45 P.M. and proceeded to the Broad Avenue Cinema where they viewed the film "Carnal Knowledge" and thereafter returned to the courtroom at which time the District Attorney offered the film in evidence and the same was admitted without objection. At that point the State of Georgia rested.

BILLY JENKINS: THE DEFENSE

Ed Lightsey testified for the defense and stated that he worked at WALB Television; that on the previous evening he had gone to the Martin Twin Theatre in Dougherty County where he saw the film "Such Good Friends". An objection by the District Attorney to questions concerning what scenes in the film "Such Good Friends" he had viewed at that theatre was overruled on the grounds that it would be permitted for the purpose of demonstrating the community's attitude and standards. He thereafter testified to the following contents of the film "Such Good Friends."

He stated that he saw a man with his clothes off; that he heard curse words, such as, bastard, fuck, screw, shit, God damn, (R.T. 26); that one of the lines was "How do you beat the shit out of a man who has just screwed your wife" and that the answer was "you don't, you beat the shit out of his wife"; that there was a scene where a woman said, "Let's fuck our way to mental health"; that he saw the front of a nude woman with breasts and pubic hairs exposed (R. 27); that in one of the scenes a "man was attempting to have sexual intercourse with a woman and the man could not achieve an erection and they were both nude laying down"; (R.T. 28); that in one of the scenes while one of the men "was talking over the telephone, a woman, one of the es-

sential characters in the movie, performed an act of sodomy on him" and that after this was over, he said "Oh, God damn, I'm sorry I got it on your nose" (R.T. 28).

On cross-examination by District Attorney Reynolds, Mr. Lightsey stated that he had seen the picture "last night" and that he had told the defense that he had seen the film "shortly after the trial began this morning after the jury had been selected" (R.T.30). Asked concerning the sodomy scene, "It didn't show her mouth on his penis" he answered, "that's right" and that it just implied that she was having her mouth on him by facial expressions and that sort of thing (R.T. 31). Asked whether in the attempted intercourse, "It didn't show the penetration of the female organ by the male" (R.T. 32) and "that was just implied, wasn't it?" he answered, "Yes."

On re-direct examination by Defense Attorney Geer, Mr. Lightsey stated that he had seen "Carnal Knowledge". Asked "Did you see any penetration of the male sex organ in the female organ? he stated, "No I did not." Asked "Did you see any pubic hairs in 'Carnal Knowledge'?" he stated, "No, I don't think so" but that he had in "Such Good Friends". Mr. Geer then asked the question, "Mr. Reynolds asked you if the scenes that you have described were obscene. You said, 'Well, yes, I guess so'. Was the total movie obscene to you?" He answered, "No, it was very sad." (R.T. 32) Asked if "Such Good Friends" had "some message of social redeeming value", he answered, "Yes, sir." (R.T. 33)

B. C. Gable testified as a witness for the defense. He stated that he had seen "Carnal Knowledge" on Monday afternoon and had seen the film "Such Good Friends" on Friday night at the Martin Twin No. 1 Theatre in Dougherty County. (R.T. 36) Asked if he had seen a nude woman in that picture show, he stated, "I believe so. I have seen so many that I will have to remember back. I think so. I'm almost certain." He stated that he had seen her breasts and thought he had seen her pubic hairs. Asked to tell the jury about the scene of a man talking over a telephone with a woman doing something to him, he stated (R.T. 36), "Well, actualy all you could see was the - - I believe was the doctor and he had

trouble getting his corset off while she wasn't watching and then - - after then he kept talking over the phone and, of course, you can imagine, but it never showed anything from the waist down at that time. . . ." Asked the question, "What was insinuated", he answered, "I don't know the proper word to use for it" (R.T. 36). Asked the question, "What did the man say, if anything, at the conclusion of the scene when this was over with. . . ." He answered, "Well, Mr. Geer, it was actually anatomical to me. I was laughing pretty good,[12] but I don't remember the exact words. Like I said, I have seen two shows since then and I can't remember the exact words. . . ." (R.T. 37)

Barbara Folsom testified on behalf of the defendant and stated that she was 16 years old and was married (R.T. 38). She identified "Gem" as a magazine which she had purchased on Mar. 22, 1971, at 1600 East Broad at the Zippy Market (R.T. 39). She identified "Gala" as a magazine she bought at No. Jackson Street at the Economy Drugstore on Mar. 22, 1971 (R.T. 40). She identified "True Men" as a magazine she bought on Mar. 22, 1971 at the 2500 block of Radium Springs Road (R.T. 40). She identified "Girls of the World" as a magazine bought by her at 100 Martin Road on Mar. 22 1971 (R.T. 40-41). She identified the magazine "Climax" as one purchased by her on Mar. 22, 1971, at the 1300 block of East Broad (R.T. 41). She identified "Man's Book" as a magazine bought by her at 1400 Palmyra Road on Mar. 22, 1971.

On cross-examination by District Attorney Reynolds, Barbara Folsom stated that she worked at the concession stand at the Broad Avenue Cinema and had started working there in October 1971 and had been working there for six months (R.T. 43). Asked whether she watched any of the movies while she was not selling tickets, she answered, "Some times if a good movie comes around there, I will watch them." (R.T. 43)

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[12] It is worth noting that defense witness Gable just would not answer the leading questions asked by Defense Attorney Geer.

Joan Singletary was called as a witness for the defendant but was excused when the District Attorney stated that in the interest of time it would be agreed that she had purchased the box of magazines comprising composite exhibit No. 7 (R.T. 45).

Defendant Bill Jenkins was called and, as is permitted under Georgia law, made an unsworn statement. He stated that he had been in the theater management business for ten years; that he came to Atlanta, Ga., in Feb. 1966 as the City Manager of Martin Theatres in charge of their operation in Albany, Ga.; that in the 10 years' period he had "played all types of movies" and "seen many changes in the audience appeal as well as production changes to satisfy these changes in the audience's appeal." (R.T. 47) Concerning his knowledge[13] of the obsenity of "Carnal Knowledge" he stated:

> "As far as the motion picture Carnal Knowledge is concerned, I have no knowledge of this motion picture being obscene or breaking any state or local law because of its content. The picture was critically acclaimed as one of the ten best pictures of 1971 and Ann Margret has received an Academy Award nomination for her performance in this picture.
>
> "Carnal Knowledge played in 29 towns in the State of Georgia and is now going into 50 to 60 more theaters for spring and summer showing.
>
> "Included in these showings are Camilla, Georgia, which has the picture booked for March the 31st and Camilla is only 30 miles from Albany. A few of the 29 cities and towns where Carnal Knowledge has played without incident are Cordele, Valdosta, Douglas, Fitzgerald, Macon, Savannah, Milledgeville, Augusta, Dalton, Gainesville, Carlton, Rome, and is in Atlanta now showing for the second time.
>
> "So, Gentlemen of the Jury, as I have said earlier, I

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[13] On Jenkins' knowledge, see Statement of Case at B2 thru B9 on pages 16 to 24 supra and the stipulation of defense counsel, infra, at text to footnote 14.

have no knowledge of the motion picture, Carnal Knowledge, being obscene or violating any state or local laws.

"Also, I would like to bring out one more thing in reference to Carnal Knowledge. We are not suggesting this movie should be shown to the children. We put – there is an R rating on the picture and we have not and don't intend to admit anyone under the age of 18 in the theater; 18 year olds and older will be the only ones that can see the picture..."(R.T. 48,49) [13A]

The defense rested.

STATE OF GEORGIA REBUTTAL

Lynn Stout was recalled as a witness for the State of Georgia and stated that in July of 1971 at the District Attorney's request he had started to make an investigation of the movies being shown in Dougherty County; that he had a 35 mm Kodak camera with Kodak 2475 high speed film that would permit him to take photographs of a motion picture screen; that some time after July 1st, 1971, he started going to all of the theaters in Albany, Ga., including the Broad Avenue Cinema. (R.T. 50) He identified nine photos (State's Ex. 2-10) as being photographs taken by him of pictures shown at the Broad Avenue Cinema July 14 (Ravager); July 12 (Sweet Bird of Aquarius); July 4 (Midnight Plowboy); July 22 (Southern Comfort) and (Tobacco Roody). (R.T. 51, 52)

In rebuttal to the statement of Mr. Jenkins that nobody under 18 was allowed in the Broad Avenue Cinema, Stout

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[13A] Under an "R" rating a 17 year old would be admitted. See 1973 International Motion Picture Almanac, Quigley Publishing Co. Inc., at page 675, reading:

R RESTRICTED UNDER 17 REQUIRES ACCOMPANYING PARENT OR ADULT GUARDIAN.

This category includes motion pictures that in the opinion of the Code and Rating Administration, because of their theme, content or treatment, should not be presented to persons under 17 unless accompanied by a parent or adult guardian.

was asked if an arrest was made in July or August of 1971 at the Broad Avenue Cinema and Stout stated that there had been and that the ticket taker, ticket seller, and the manager and projectionist had been arrested and that the age of one of the projectionist was 16. (R.T. 52, 53)

Asked in rebuttal whether "Carnal Knowledge" had been seized from the Martin Theater in October, he stated, yes, and that he had drawn up the search warrant after viewing the film. Asked the question, "Do you know whether or not sometime after that the Martin Theater agreed not to show the film unless there was a judicial determination?" Mr. Geer interrupted [14] and the following discourse occurred:

> "Mr. Geer: I will stipulate that I recall the agreement Your Honor, and it was admitted, and I will stipulate to it.
>
> The Court: Let the record so indicate."

On cross-examination by Defense Attorney Geer, Stout was asked, "Do you know that the Martin Theaters had already shown every last one of them (the pictures identified as State Exhibits 2-10) before they were shown over at the Broad Avenue Cinema?" He answered, "I knew that Tobacco Roody was shown over there at the Martin Theater." (R.T. 55)

At the conclusion of Stout's testimony District Attorney Reynolds offered the photographs in evidence. Mr. Geer objected to their introduction except "to show the community standards as evidence on behalf of the State of Georgia." District Attorney Reynolds stated that they were being offered for a different purpose [15]:

> "The purpose is to impeach Billy Jenkins when he said that he has no knowledge of Carnal Knowledge being obscene. We introduce those in evidence to show that he had knowledge of the obscenity in those films and that he knew that the Martin Theaters for all

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[14] See Footnote 13.

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[15] See text, at Footnote 13, supra, and Statement of the Case at page 16 to 23 supra.

practical purposes had considered they shouldn't be shown. . . ." (R.T. 56) Thereafter, the Court ruled (R.T. 58)

"The Court: "Mr. Reynolds indicated that he is offering it for impeachment and it's for the Jury to decide on that question. . . ."

Both parties rested. (R.T. 58, 59)

On Mar. 23, 1972, the jury returned a general verdict of guilty (See Albany Herald news article of Mar. 24, 1972, a copy of which appears herein at Appendix 0, page 9.) (J.A. 38). Jenkins was fined $750.00 and sentenced to 12 months probation (J.A. 40-41).

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that Section 26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that it was error to refuse to give defendant's charge No. 1 which "defined community standards as being in the nation as a whole [16] and any less standard applied in the charge is harmful and prejudicial to defendant;" and that the film 'Carnal Knowledge' is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia J.A. 46-51).

On June 21, 1973, this Court announced its decision in *Miller v. Calif.*, 413, US 15 (1973) and companion cases. On July 2, 1973, without hearing oral argument, the Supreme Court of Georgia affirmed the conviction of Billy Jenkins by a vote of four-to-three. *Jenkins v. State of Georgia*, 230 Ga. 726, 199 SE 2d 183.

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[16] Amicus submits that Appellant's claim of error in the trial court's refusing to instruct on "National Standards" was answered in Miller v. California 413 US 15, 37 L.Ed.2d, 419, 435, 93 S.Ct. 2607 (June 21, 1973). Jurisdictional Question 3 (JA4) was not perfected and is not properly before this court.

SUMMARY OF ARGUMENT

I

Georgia Code Section 26-2105 functions in two separate capacities. First, viewed independently as a statute which proscribes specific conduct, it describes an indictable offense under the criminal law. Secondly, construed in pari materia with the general obscenity statute, Georgia Code Section 26-2101, it prescribes a specific standard which, upon being ingrafted to that statute, supplies the ingredient which is necessary under this Court's present thinking, to assure the constitutionality of the Georgia State Obscenity Statute.

Due to the nature of the grand jury indictment, the Georgia Supreme Court was not confronted with the facial *validity* of Georgia Code Section 26-2105. Although Billy Jenkins was arrested on a charge of violating Section 26-2105, he was indicted and tried for "distributing obscene material" which is the indictable crime set forth in Georgia Code Section 26-2101(a). The grand jury merely pleaded the specific standards of Section 26-2105 so as to give the defendant "fair notice" as to the nature of the "distributing obscene material" charge.

It defeats logic to say that an act of sodomy or perversion is punishable as a felony, and at the same time hold that a 2-1/2 minute pictorial display of sodomy on an enlarged motion picture screen, albeit simulated, to a public audience, as a part of commercial entertainment, may not be reached by legal sanctions, both civil and criminal.

Analytically, there are two separate problems. The first concerns the civil side of the issue as it pertains to the right of government to enjoin the public exhibition of explicit sexual conduct, based upon judicially or legislatively determined public policy. The second concerns the criminal side of the same issue, that is, the right of government to impose criminal sanctions against those who engage in conduct which contravenes the public policy which forbids such public display.

This Court would be misguided were it to undertake an analysis of this criminal statute without at the outset examin-

ing, and bringing into focus the extent of the governmental power which exists under the civil remedy, where lewd conduct is involved. Such an examination is necessary so that collateral issues such as "fair notice", "mens rea" and "scienter" may not becloud the broad reach of the governmental policy against public lewdness.

Had the District Attorney of Dougherty County been able to try the basic issue regarding "Carnal Knowledge" on the *civil* side of the Georgia court, as was done in the "I Am Curious (Yellow)" case in Atlanta, Georgia, the focus would have been sharpened. No one would have misread the real issue, not even the three Justices who dissented in the Georgia Supreme Court below. The issue there would have been simply, "Is the artist such a favorite of the law that, in plying his craft, he may exhibit to a public audience on an enlarged motion picture screen for public entertainment, an acted-out version of simulated oral sodomy, engaged in by 'beautiful' Hollywood actors to the accompaniment of pleasant surroundings and inviting musical sounds – in the face of an overriding public policy to the contrary?" On that fundamental issue, Judge Burke of the New York Court of Appeals answered, "No." in *Trans-Lux Distributing Corporation v. Board of Regents.*

Where civil sanctions are being applied, "fair notice" is not an issue. A final and complete resolution of the civil lawsuit does not depend upon the litigations issue as to whether "sexual conduct" is "specifically defined" by applicable state law. Further, since the Court's injunction is prospective in nature, no ex post facto collateral issue is presented.

Those courts which have faced and considered the *civil* issue have disposed of the same quite simply. See Justice Tom Clark, concurring in *Kingsley International Pictures Corp. v. Board of Regents*, 360 US 684, Justice Burke speaking in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857, the per curiam opinion of the Ohio Supreme Court in *State of Ohio ex rel Keating v. Vixen*, 27 Ohio St.2d 278 as adhered to on remand in *State of Ohio ex rel Keating v. Vixen*, 37 Ohio St.2d 215 and *Evans Theatre Corp. v. Slaton*, 227 Ga. 377.

The legislative history of Section 26-2105 indicates that it was derived from Section 10 of the CDL Model Obscenity Statute. The comments on that model legislation indicate that the intent was to codify the concurring opinion of Justice Tom Clark in *Kingsley International Pictures, Corp. v. Board of Regents*, 360 US 684, as explicated by Justice Burke in *Trans-Lux Distributing Corp. v. Board of Regents* 248 NYS 2d 857.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area, due in no small part to the failure of this Court to express a judicial philosophy which takes into account the public mores which have governed this Nation since its founding. A casual reference to the moral laws of this Nation dealing with sexuality, as codified by the legislatures of the State and Federal Government, is proof that such public mores do presently exist and are well defined. The foundation for this confusion in the motion picture area was laid in this Court's treatment of the "Lady Chatterly's Lover" appeal reviewing the refusal of the New York Court of Appeals to license the film "Lady Chatterly's Lover" as violative of the New York Education Law. The 1959 Court reversed the New York Court's ruling in an opinion written by Justice Stewart, which is criticized by Terrence J. Murphy in his book "Censorship: Government and Obscenity" and by Professor Clor in his book "Obscenity and Public Morality" for the moral vacuum it created.

In his dissenting opinion in the New York Court of Appeals below, Justice Van Voorhis had suggested that the motion picture division failed to exercise their power to exclude "obscenity" which included "the portrayal on the public screen of sexual intimacies whether they be marital or extra-marital". In his concurring opinion, Justice Clark voiced a somewhat similar rationale: "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray acts of sexual immorality, perversion or lewdness'. " Five years later, Justice Clark's statement of the law was adopted by a majority of the New York Court of Appeals as the principle under which a license was denied to the Swedish film, "A Stranger Knocks."

The latter film's only claim to fame was predicated upon two scenes depicting explicit sexual intercourse. Justice Burke, speaking for the majority in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 NYS 2d 857, expounded on that principle at great length: "It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibitions as similar conduct if engaged in on the street. . . I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. . . To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic display. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of film . . . ." This Court did not come to grips with this very real issue when the *Trans-Lux* case came before it during the 1964 October Term. For failure of this Court to enunciate a judicial philosophy in conformity with traditional moral law, this Nation now finds its public mores in the year 1974 - - - 15 years after the "Lady Chatterly's Lover" decision and 9 years after the "A Stranger Knocks" ruling – in a state of collapse, and the motion picture industry dominated by pornographers and ruled by anarchy. Amicus submits that the "Lady Chatterly's Lover" rationale must be reexamined.

When this Court handed down its decisions on June 21, 1973, in *Paris Adult Theatre I v. Slaton, et al.* 413 US 49, it mixed apples (general obscenity statutes involving criminal sanctions in *Miller)* with oranges (general obscenity statutes involving prospective civil injunction in *Paris Adult Theatre I)* and came by a result which engendered confusion. Such inconsistencies however would be of minor significance were the subject of the inquiry herein the facial constitutionality of Georgia Code Section 26-2105, standing alone and independent of the "pari materia" statutory construction placed upon it by the Georgia Supreme Court. On its face, Section 26-2105 is a special statute whose application not only is limited to conduct but is further restricted to that type of conduct which is visual. Considering Section 26-2105 by

itself, and independent of the "pari materia" construction placed upon it by the Georgia Supreme Court, it seems abundantly clear that the broad rule laid down by this Court in *Miller v. California, supra* and *Paris Adult Theatre I v. Slaton, supra,* involving *obscene materials* cannot logically be applied so as to limit the applicability of that statute.

Amicus submits that for this Court to hold that Section 26-2105(b) may not in the light of constitutional standards be applied independently of the General Obscenity Statutes is without basis in legal or ordinary logic, and if acceded by this Court, would compound the existing confusion. The inconsistency of such a line of reasoning is exposed by the use of a hypothetical example centering on the sodomy crime and the film "Deep Throat."

The conduct which is made illegal by Georgia Code Section 26-2105 is described as conduct which would be public indecency under Section 26-2011. Section 26-2011 describes four specific acts which come within the proscription of the statute namely:

(a) An act of sexual intercourse;
(b) A lewd exposure of the sexual organs;
(c) A lewd appearance in a state of partial or complete nudity;
(d) A lewd caress or indecent fondling of the body of another person.

There can be little doubt that such language satisfies the "fair notice" requirement stated in *Rabe v. Washington,* 405 US 313. The very purpose of the 1968 amendment which introduced the specific language to Section 26-2011 was "to substitute explicit conduct which falls within its proscriptions for the rather vague 'tending to debauch the morals' formerly employed." Except for the act of sexual intercourse, the designated acts must be performed in a lewd manner. The term "lewd" has a well-defined meaning under the law. Further, any question as to whether, under state law, the proscription as to an "act of sexual intercourse" included simulated sexual activity was fully answered in *Slaton v. Paris Adult Theatre I,* 185 S.E.2d 768 at 770 (Nov. 5, 1971).

II

As previously observed under Point I, while Jenkins was arrested on Feb. 10, 1972, for violating Georgia Code Section 26-2105, he was indicted by the grand jury on an accusation of "distributing obscene material" – a violation of Section 26-2101(a) of the Georgia Code. Under the grand jury indictment as framed, the facial validity of Section 26-2105 cannot be made the foundation for this appeal.

As noted above, Appellant was charged with and tried for a violation of Georgia Code Section 26-2101(a). The jury instructions as to Georgia Code Section 26-2105, 26-2101(c), and 26-2011 were given for the purpose of informing the jurors on the specific standards of conduct set for the state community by the State Legislature.

Appellant's error is twofold. First, he refuses to read the plain language of the accusation and the trial judge's instructions as meaning what they say. Secondly, he refuses to acknowledge that the rationale of this Court's decision in *Miller v. California*, 413 US 15, has upheld the construction given the Georgia Statutes by the trial court and his manner of instructing the jury. The *Miller* decision has unearthed one very basic and obvious principle, and that is, that all morality legislation functions in two separate capacities. As criminal legislation, such statutes "proscribe" certain conduct as illegal. At the same time, such legislation in its written form (being the enshrinement of the voice of the people) "prescribes" – that is, lays down a guide which can and must be given to the jury in proper cases, to be used by them at litmus paper in arriving at their factual determinations on a general obscenity charge.

Nor can Jenkins claim that he was not aware that he was being charged with a violation of Section 26-2101(a). His entire defense was aimed at establishing proof of the type of "community standards" which would win him an acquittal. He made no attempt in either the sworn testimonial evidence of others or in his own unsworn statement to offer evidence which would constitute a defense to Section 26-2105(b) such as, that the film did not contain acts which could be held to be public indecency, or that he had no knowledge of the portrayal of such acts in the film itself.

Finally, the Judge's instructions to the jury were clear that he was being tried on a Georgia Code Section 26-2101 accusation. The Trial Judge's instructions on the substantive crime of distributing obscene materials are embodied in the seven paragraphs which appear at pages 30-31 of the Joint Appendix. Those instructions to the jury (as the "trier of facts") fully comport with the rule of law laid down by this Court in *Miller v. California, supra.* Under the trial judge's first two statements, the jury (1) was informed that the nature of the accusation was that of knowingly exhibiting obscene material, and (2) was given the definition of the term "obscene material". During the case in chief, the jurors had viewed the film "Carnal Knowledge" which contained several scenes depicting explicit sexual activity. In view of such trial facts indicating explicit sexual activity on film, it became the duty of the trial judge to instruct the jury on those specific standards of conduct set by the Legislature which bore a relationship to the explicit sexual activity on film. As a part of the law on those questions, the jury was entitled to be informed as to the legislative voice of the people, regarding the public exhibition of films showing: (a) an act of sexual intercourse, and (b) a lewd caress or indecent fondling of the body of another person, etc. . .as enshrined in Senate Bill 108 and Section 26-2105(b).

It is not error for the trial court to read statutes in its instructions if the statutes read are pertinent, are justified by the evidence, and where their meaning as applied to the facts in the case is not susceptible of more than one construction. The latter requirement was met by the precautionary instructions given by the trial judge to the effect that "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activity, but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore defined such limits as to take the movie outside of the protection of the person involved. . . ."

Appellants claim that the trial judge should have defined community standards as being in the Nation as a whole has already been rejected by this Court in *Miller v. California,* 413 US 13, where Justice Burger, writing for

the majority of the Court, cited with approval the very language used by the trial court. Further, the Georgia Supreme Court has since indicated in *Slaton v. Paris Adult Theatre I*, 201 S.E.2d 456 (Oct. 30, 1973), that the standard for *appellate review* under Georgia law is a state standard, which places Georgia law squarely within the protection of the *Miller* decision. There is no substance in appellant's claim that the trial court in Dougherty County, Georgia must, in the first instance, instruct the jury in terms of a state standard. There is no reason to suspect that the standards of Dougherty County are any different than those in any other county in the State of Georgia or the Nation as a whole. In fact, at least one New Jersey Appellate Court has held that it was to be presumed that the community standards were the same.

Appellant in failing to present the question on community standards in the state court proceedings below, has failed to raise a substantial federal question for this Court's jurisdiction to lie.

The Georgia Supreme Court's interpretation given to Section 26-2105, namely, that it was to be construed in "pari materia" with the General Obscenity Statute, fulfills the requirement of this Court as stated in *Miller v. California, supra.* Except for the recent *Miller* refinement, the constitutionality of the Georgia Statute has already been established in *Gable v. Jenkins*, 397 US 592 (Apr. 20, 1970).

III

While *Miller v. California*, decided by this Court on June 21, 1973, has removed all of the hurdles which had been constructed against law enforcement prior to that date, the expected positive gains from those decisions have not been achieved. What is needed now is some strong direction from this Court to bring the Nation's courtrooms back on course. Amicus submits that the Court to steer, which this emergent condition requires, is in the direction of full reliance upon the rule of law expressed by Justice Harlan in his consenting opinion in *Roth-Alberts*, 354 US at 497 (June 24, 1957).

One of the principle questions before this Court, is the matter of how this Court will conduct itself in the future in reviewing the final results achieved by a state judicial system which has placed the new *Miller* requirements for specificity into operation. The alternatives are: (1) a resumption of the role of, what Amicus suggests is, dictatorial censorship at the hands of the judiciary, or (2) a commitment to the common sense view espoused by Justice Harlan, accompanied by a return to the state judiciary of the basic power to supervise public morality. The stage was set for this transfer of power when this Court stated in *Miller v. California*, 413 US 15: "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary...." The authorities cited for that proposition were Justice Harlan's concurring and dissenting opinions in previous state obscenity cases during the past 15 years.

Kois v. Wisconsin, 408 US 232 held that the dominant theme of the poem considering its placement amid a selection of peoms in the interior of a newspaper did not appeal to prurient interest. No such defense can be made of the subject matter and the facts on record herein.

This Court cannot shut its eyes to reality and to the fact that the real party in interest in this appeal is not Billy Jenkins, but AVCO Embassy Pictures Corp., the producer, Joseph E. Levine, the executive producer, Michael Nichols, the director, and the Motion Picture Association of America, Inc. The issuance of an "R" rating and its incorporation into the film print was intended by those producers and their agents to be a representation that, applying contemporary community standards, "Carnal Knowledge" was and is suitable film fare for (1) persons 17 years of age and over and (2) persons under 17 years of age when accompanied by parents or adult guardians. By its verdict in this case, the jury in Albany, Georgia, thought otherwise. So did a majority of the Georgia Supreme Court. To upset those judgments would lend encouragement to a disturbing develop-

ment which has been taking place in the area of motion picture films.

The commercial enterprise, which the motion picture industry represents, is engaged in a life and death struggle for the entertainment dollar. The movie moguls, whose primary concern is the corporate dollar, now find it necessary to concentrate their efforts on the type of entertainment which is not yet available to the general audience on the television screen – the theme with a sensationalized sex appeal. Although the promotion vehicle herein is slightly different from that employed by the typical porno producer, nevertheless the effect is the same. Although the admission price to "Carnal Knowledge" and similar films can be expected to return less than that of the typical porno theater, the potential audience of 17 year olds and over more than compensates for the difference in admission price and makes such production a business imperative – so long as the industry can get away with it in the courtroom. Both operations amount to one and the same thing – a capitalization on the appeal to prurient interest for the sake of commercial profit.

The technical excellence and potential audience for "Carnal Knowledge" sets it into a classification which is more destructive to society than "Deep Throat". Under Justice Harlan's appellate review, technical excellence is not an exculpating factor. See Justice Harlan's dissent in *A Book Named Memoirs v. Attorney General of the Common of Mass.*, 383 US at 459.

Studs Terkel in the Chicago Daily News on July 24-25, 1971, reviews the film as follows: "Carnal Knowledge is a masterpiece in slick packaging. That there is nothing inside, nothing other than the illusion of something is as small consequence to the box office. . . The tragedy lies not in this film, but in its being taken seriously as a profound comment on men and women. . . ."

The question before this Court on appellate review is whether or not "Carnal Knowledge" taken as a whole can be said to treat sex in a fundamentally offensive manner. See *Jacobellis v. Ohio*, 378 US 184 (Harlan dissenting). Harlan states his test as follows: "As to the states, I would make the

federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundmentally offensive manner, under rationally established criteria for judging such materials. . ." The answer to whether the producers and directors were capitalizing on an appeal to the prurient interest and whether the subject matter treated sex in a fundamentally offensive manner can only be determined by the individual members of this Court undertaking an analysis of "Carnal Knowledge". Amicus has attached hereto as Appendices A and B, a "Continuity" and a "Time-Motion Study" of the film "Carnal Knowledge". The "Continuity" appearing herein at Appendix A contains an accurate reproduction of the sound portions of the film identifying the actors, their roles, and what they say as the film progresses. In addition, selected visual screened depictions are captured by still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance or exaggeration for the benefit of the justices considering this appeal. The "Time-Motion Study" appearing herein at Appendix B is a chronological series of photographs of the motion picture film, timed in their relative order of appearance which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Also, attached to this Brief is a casette tape containing the sound track for "Carnal Knowledge" with 756 superimposed signals indicating at what point in the sound track the particular photograph used in the Continuity was taken. The "Continuity" and accompanying tape permit the film to be analyzed thru examination and re-examination.

In view of the large audience of 17 year olds and older to whom "Carnal Knowledge" was aimed, Amicus would ask the individual members of this Court whether the simulated oral sodomy and lewd fondling scenes, etc., do not consti-

tute an indictment against the film and the damage it has done and will do to the system of values and language of sex in our society. In a collection of writings in "A Case Against Pornography" Ian Robinson makes the following statement against pornography: "It is the central questions of value that defenders of pornography, and liberalizing sex-talk in general, tend to ignore – which is itself, we shall argue, a tendency to deprave and corrupt. . . If pornography is a threat it is. . .because pornography works on, affects and changes the common language of sex, and because it tends to deprave and corrupt that language. . . ." "Pornography doesn't cause depravity and corruption, it is depravity and corruption. . . ." "Because we have to do here with a language of sex, and with corruption as part of understanding, our readers are corrupted to the degree of their reading, and non-readers are corrupted to the degree of the impact of pornography on the common language. This last is why the matter affects everybody: The language of sex is everyone's concern, celibates and all, because we all have to make sense of sex within it. . . ." The author then makes the following statement which has particular application here: "A work whose sexual content is left deliberately uncontrolled by the artist is pornographic. Nude love-making on stage or screen is always necessarily pornographic because the expression - the understanding of the audience - cannot be controlled as part of the work. Nude love-making immediately breaks the art of the play and instead thrusts real voyeurism upon the audience. . . . We are used to modesty and privacy, and in our language of sex the response to nude love-making is not to the play but to the real (or not) action . . . ."

In the above framework of values, if the State of Georgia in crystal-clear legislative language, and crystal-clear judicial language, holds that a motion picture exhibitor may not exhibit "an act of sexual intercourse" and "a lewd fondling of the body of another person. . . ." then by sovereign fiat, those scenes become hard-core pornography. Amicus submits that it is not a proper exercise of this Court's federal appellate jurisdiction to tell the Georgia State Government that

it may not so act in relation to the scenes depicting explicit sexual conduct in "Carnal Knowledge".

The values which are at stake here are "public values" not those which Justice Marshall addressed himself in *Stanley v. Georgia*, 394 US 557.

Correlary to the question regarding the "Obscenity vel non" of "Carnal Knowledge" is the further question which should be asked regarding Jenkins' "conduct" as operator of the Broad Avenue Cinema. The evidence shows that Jenkins' conduct was such that it can be said the State acted reasonably in finding Jenkins guilty of operating a business which treated sex in a fundamentally offensive manner. The jury had before it photographs of other types of conduct exhibited regularly by Jenkins upon the motion picture screen. Further, Jenkins knew that "Carnal Knowledge" had been challenged successfully in the courtroom, and that an introduction of the film at the Broad Avenue Cinema was certain to bring law enforcement activity and publicity.

ARGUMENT
I

GEORGIA CODE ANNOTATED SECTION 26-2105 IS CONSTITUTIONAL ON ITS FACE

INTRODUCTION

Georgia Code Ann. Section 26-2105 functions in two separate capacities. First, viewed independently as a statute which proscribes specific conduct, it describes an indictable offense under the criminal law. See *Trans Lux Distributing Corp. v. Board of Regents* 248 N.Y.S. 2d 857 (Mar. 26, 1964), reversed on other grounds in *Trans Lux Distributing Corp. v. Board of Regents* 380 U.S. 259 13 L.Ed. 2d 959, 85 S Ct. 952 (Mar. 15, 1965). Secondly, construed in pari materia with the general obscenity statute, Georgia Code Ann. Section 26-2101, it prescribes a specific standard which, upon being ingrafted to that statute, supplies the ingredient which is necessary, under this Court's present thinking, to assure the constitutionality of that portion of the Georgia test for obscene materials reading: "applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion. . ." *Miller v. Calif.* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S. Ct 2607, *Paris Adult Theatre I v. Slaton* 413 U.S. 49, 37 L.Ed. 2d 446, 93 S. Ct 2628 (June 21, 1973).

Due to the nature of the grand jury indictment, the Georgia Supreme Court was not directly confronted with the facial validity of Georgia Code Ann. Section 26-2105, an issue which is inherent when the first function of the statute, mentioned above, is under consideration. The Georgia Supreme Court did not have before it, nor did it consider an indictment charging a violation of Georgia Code Ann. Sec. 26-2105. Although Billy Jenkins was *arrested* on a charge of violating Georgia Code Section 26-2105 (JA6), the March Term Grand Jury *did not indict* him on that charge. Instead, Jenkins was indicted and tried for "Distributing Obscene Material" (JA 7,8). The language of the indictment describes criminal conduct which is the indictable crime set forth in Georgia Code Ann. Section 26-2101(a). In framing the grand jury indict-

ment, the author merely pleaded the specific standards of Section 26-2105 so as to give the defendant fair notice as to the full nature of the charge - the second function of Section 26-2105, noted above.

A. The Problem of Applying Civil and Criminal Sanctions to Lewd Conduct in Motion Picture Films.

The communication media is plagued at the present time with an avalanche of lewd displays and language which, if engaged in off-stage or off-screen and in public, would be subject to criminal penalties as improper public conduct. It beggars logic to say that an act of sodomy or perversion is punishable as a felony, [16A] and at the same time hold that a 2 1/2 minute pictorial display of sodomy on an enlarged motion picture screen, albeit simulated, to a public audience, as a part of commercial entertainment, (See Appen. A at pages A78 -A84 and Appen. B at pages B24-B27) may not be reached by legal sanctions, both civil and criminal. Further, it is equally as illogical to say, on the one hand, that such conduct may be reached by civil sanctions, see *Evans Theatre Corporation v. Slaton*, 227 Ga 377, 180 SE 2 712, cert denied in *Evans Theatre Corp. v. Slaton*, 404 US 950, 30 L.Ed. 2, 267, 92 S.Ct. 281, (Nov. 9, 1971), yet may not be reached by criminal

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[16A] See Stone v. Wainwright U.S. , 50 L.Ed. 2d 179, S.Ct. (Nov. 5, 1973) discussed at Footnote 24, infra.

Which is more devastating to society. . . a 2-1/2 minute scene of simulated oral sodomy projected on a public screen of a neighborhood theater to a packed audience of 17 year olds and older, or several acts of explicit oral sodomy (e. g. Deep Throat) projected on a public screen in a porno theater, located on run-down Main Street or in a local neighborhood? Does any member of this Court have the right to draw such a distinction? See Judge Learned Hand's views at footnote 36, and the views of the Georgia Supreme Court in Evans Theater Corp. v. Slaton, supra, quoted at page 13, supra. Further, does the state of the public morals of this nation in 1974 support the thesis of Justices Brennen, Stewart, Marshall, and Douglas which underlies their dissenting opinions in Miller v. California, et al, supra, that we, as a nation, can withstand the assault such a distinction would encourage. See footnote 24 infra.

sanctions. . . or, that it may be reached by criminal sanctions, but only when examined, not as to conduct but, in accordance with the test for "obscene material" established by this Court in *Miller v. California, supra.*

It would appear that, unless there is *now* a different explanation in our jurisprudence, that is exactly what Justice Douglas was willing to admit to, in his 1957 dissent, in reviewing two criminal cases in Roth-Alberts, 354 US 476, at 512, 1 L.Ed. 2 1498, 77 S.Ct 1304 (June 24, 1957:

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct. . . ." (Our emphasis.)

Analytically, there are two separate problems presented here, each of which deserves a separate analysis. The first is the question raised on the civil side of the issue, as it pertains to the right of government to enjoin the public exhibition of explicit sexual conduct based upon a stated public policy, either judicially determined or legislatively determined. The second is the question raised on the criminal side of the same issue, as it pertains to the right of government to impose criminal sanctions upon those persons who, for whatever reason, elect to engage in conduct which contravenes the public policy which forbids such public displays.

Even though the statute under attack herein is a criminal statute imposing criminal sanctions, and the case under review is an appeal from a criminal conviction arising out of the application of that criminal statute to specific subject matter, still, the attention of this Court would be misguided were it to undertake an analysis of the criminal statute or its application in a given circumstance, without, at the outset examining, and bringing into focus the extent of the governmental power which exists under the *civil* remedy where lewd conduct is involved. That is essential, in order that side considerations which appear upon an analysis of the criminal sanctions, such as "fair notice", "mens rea", and "scienter" considerations,

etc., may not cloud and obfuscate the broad reach of the governmental policy against public lewdness.

B. A State's Power to Apply Civil Sanctions to Lewd Conduct on Films Has No Limitations such as Those Stated in Miller v. Calif., as to Obscene Materials.

The caveat which Amicus seeks to articulate can best be brought into focus by an illustration which takes into account the subject matter "Carnal Knowledge" and the surrounding historical facts when, in Jan. and Feb. of 1972, the case was prosecuted in Albany, Georgia. Suppose, for example, that the Dougherty County District Attorney had not been frustrated by the shrewd defense tactics of Billy Jenkins' lawyer, who removed the Dougherty County Superior Court civil action *Robert Reynolds, District Attorney v. S.W.J., Inc.*, C.A. No. 7296, to the Federal District Court. (See Statement of Facts, at Point B2 on pages 16-17), and had been able to try the basic issue as to "Carnal Knowledge" on the *civil* injunction side of the Georgia Courts, as was done in the "I Am Curious (Yellow)" case in Atlanta, Georgia? Amicus submits that, in that case, the focus would have been sharpened so that no one could have misread the real issue, not even the three justices who dissented in Jenkins v. Georgia, supra, in the Georgia Supreme Court below.[17] The issue there, very

[17] It was for this very reason that the Atlanta, Georgia, law enforcement effort in 1971 was pointed in the direction of the civil remedy and the forfeiture penalty, rather than at the criminal sanctions. (See page 11, supra) Compare the opinion of the Georgia Supreme Court in the "I Am Curious (Yellow)" case, Evans Theater Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712, Mar. 4, 1971. In the criminal area, one is inclined to confuse the issues by reasoning along "dominant theme" lines, which assumes, erroneously, that the proscribed sexual conduct, which is specifically defined is acceptable so long as it is an "integrated" part of the theme. Amicus submits that the correct rule of law was stated in Trans-Lux Distributing Corp. v. Board of Regents, 248 NYS 2d 857 (Mar. 26, 1964):

> "If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition." Only when this misapprehension is corrected by a directive from this Court, will it be possible for law enforcement to assure that films like "Deep Throat" will have a very short run.

simply, would have been "Is the artist such a favorite of the law that, in plying his craft, he may exhibit to a public audience on an enlarged motion picture screen for public entertainment, an acted-out version of simulated oral sodomy, engaged in by "beautiful" Hollywood actors to the accompaniment of pleasant surroundings and inviting musical sounds? – in the face of an overriding public policy to the contrary, clearly articulated [18] by all three elements of government (See "Statutory Background" at Points A, 2, 3, and 4, supra at pages 10-15).

Certainly the problem is more easily understood where the only issue is "May the State enjoin such live conduct?" or, may the state enjoin such filmed portrayals of explicit "sexual conduct?" or, "May the State declare a forfeiture of the property interest in the product which embodies the lewd portrayals" or, "May the state declare a forfeiture of the profits from the commercial public exhibitions of such subject matter?" It seems to Amicus that, on this fundamental issue, Associate Judge Burke of the New York Court of Appeals was

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[18] In the light of subsequent events (i.e., the chaotic retreat of Justice Brennan in Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, at 467-491, 93 S Ct 2628 (June 21, 1973) was not Justice Brennan (in voting to override the "articulated" public policy of the States of Florida and Massachusetts) one of the principal actors in a "reverse" censorship movement in Grove Press, Inc. v Gerstein, 378 US 577, 12 L.Ed2d 1035, 84 S Ct 1909 (June 22, 1964) and Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 US 413, 415, 16 L.Ed.2d 1, 3, 86 S Ct 975 (Mar. 21, 1966)? Compare Justice White's position in his dissent in Grove Press, Inc., v. Gerstein, supra, and in Memoirs, supra, at 461:

> "Nor does it mean that if books, like Fanny Hill are unprotected, their non prurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure. . . ."
>
> "Finally, it should be remembered that if the publication and sale of Fanny Hill and like books are proscribed, it is not the the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating Fanny Hill as obscene and forbidding its sale, the First Amendment does not prevent it from doing so. . . ."
>
> "I would affirm the judgment below." (Our emphasis.)

plainly correct when he stated in his majority opinion in *Trans Lux Distributing Corp. v. Board of Regents*, supra, at 863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is priviledged to bend morals, policy and law to its internal craft standards, then neither should producers of films."

Where civil sanctions are being "fair notice" is not an issue. A final and complete resolution of the civil lawsuit does not depend upon the litigatious issue as to whether "sexual conduct" is "specifically defined" by applicable state law, *Miller v. California*, 413 US 15, 37 L.Ed.2 419, 431, 93 S.Ct. 2607. Since the Court's injunction is prospective in nature, no "expost facto" side issue is presented. See *State of Ohio ex rel Keating v. A Motion Picture Film Entitled Vixen*, 272 N.E.2d 137, 141, 27 Ohio St.2d 278 (July 21, 1971) as adhered to on remand in *State ex rel Keating v. Vixen*, 37 Ohio St.2d 215, 301 N.E.2d 880, (Sept. 26, 1973):

> "Since the real issue before this Court is whether the injunction should be dissolved, or combined in force and effect, RC §§ 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below. . .
>
> It follows that we have authority to render such judgment as the Ohio Court would now be required to render, if the cause were remanded. Such authority is specifically given in Section 2(B) (1) (f), Art. IV Ohio Constitution."

In Amicus' view the authorities which have considered the civil issue, as thus isolated, have made a resolution of that single issue quite simple. Those authorities start with Justice Tom Clark concurring in *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 702, 3 L.Ed2, 1512, 1524, 79 S.Ct. 1362 (June 29, 1959):

> "It may be, as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 N.Y.S.2d at 363, 151 N.E.2d 204, 205, 175 N.Y.S.2d at 50. And, as my Brother Harlan points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion, or lewdness."* (Our emphasis)

See also Justice Burke speaking in *Trans Lux Distributing Corp. V. Board of Regents*, 248 N.Y.S.2d 857, 858-864 (Mar. 15, 1965):

> "If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition. The licensing statute contemplates the deletion of such material. It may either be omitted entirely or the producer may redo the scene another way. *If it is objected that the enterprise is artistically not worth doing without the scene as it stands, this is the problem not of the law, but of the producer who has made a pornographic scene so central to his work. . .* " (Our emphasis)

The Per Curian opinion of the Ohio Supreme Court voiced the same sentiment in *State of Ohio ex rel Keating v. "Vixen"*, 27 Ohio St.2d 278, 272 N.E.2 137 at 140 (July 21, 1971) as adhered to on remand in *State of Ohio ex rel Keating v. "Vixen"*, 37 Ohio St.2d 215, 301 N.E.2d 888, (Sept. 26, 1973):

> *"Assume, hypothetically, that the main character in "The Sound of Music" performs, during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated* merely because the producer had an "eye on the recent Supreme Court ruling?" The question supplies its own answer. . ."

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse. . . "(Our emphasis)

That is exactly the conclusion reached by the Georgia Supreme Court on the civil aspect of this philosophical controversy. See *Evans Theatre Corp. v. Slaton*, 227 Ga 377, 180 S.E.2d 712, where the Georgia Supreme Court held at page 715:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga.L.1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. *There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.* (Our emphasis)

C. The Intent of the State Legislature in Enacting Georgia Code Section 26-2105 was to Codify the Rationale Expressed by Justice Tom Clark in his Concurring Opinion in Kingsley International Pictures, Corp. v. Regents, 360 US 684, 13 L.Ed.2, 1512, 1524, 79 S.Ct. 1362 (June 29, 1959) and to Apply Criminal Sanctions thereto.

Senate Bill 108, as originally filed, contained the major provisions of the CDL Model Obscenity Statute (see Statutory Background supra at pages 13 to 15). CDL Model Obscenity Statute sections 1 through 12, were offered as proposed Georgia Code Annotated Sections 26-2101 through 26-2112. CDL Model Obscenity Statute sections 17, 18, 19, 20 and 22 were offered as proposed Georgia Code Sections 26-1113

through 26-2117. CDL Obscenity Statute, sections 13, 14, 15, 16 and 21 were the only provisions omitted from Senate Bill 108 as originally filed. See copy of Senate Bill 108 as originally filed at Appendix H, pp. 3-13 and compare the same with the CDL Model Obscenity Statute at Appendix F pages 3-8. On March 4, 1971, a substitute bill to Senate Bill 108 was offered which deleted most of the sections of the CDL Model Obscenity Statute, but retained 1(a) public nuisance 10 (lewd conduct on the screen) and 18(a) (contraband) as proposed Georgia Code Sections 26-2103, 26-2104, and 26-2105 see Appendix I. On March 5, 1971, the substitute bill passed the Senate 29 to 0 and on Mar. 9, 1971, that bill passed the House by a vote of 104 to 4. On April 1, 1971, substitute Senate Bill 108 was signed by the Governor and became law on that date. See Appendix I at page 3 to 9.

Since Georgia Code Section 26-2105 was derived from Section 10 of the CDL Model Obscenity Statute, the intent of the Legislature becomes clear beyond doubt. See comments to Section 10 of the CDL Model Obscenity Statute, at Appendix G, page G-12, reading:

> "Sections 10 and 11 codify the rationale applied by the majority of the New York Court of Appeals in *Trans Lux Distributing Corp. v. Board of Regents*, 248 N.Y.S. 2d 857 (Mar. 26, 1964), reversed on other grounds in *Trans Lux Distributing Corp. v. Board of Regents* 380 US 259 (Mar. 15, 1965). See also Justice Clark concurring in *Kingsley International Pictures Corp. v. Regent* 360 US 684 at 702."

D. The Concurring Opinion of Justice Tom Clark in Trans-Lux Distributing Corp. v. Board of Regents contains a Correct Statement of Constitutional Law.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws.

Such confusion is [19] due in no small part to the failure of this Court until recently to enunciate a judicial philosphy which takes account of the public mores which have governed this Nation since its founding.[20] A casual reference to and brief reflection on the moral laws of this Nation dealing

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[19] The Court in People v. Kirkpatrick, 316NYS2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

> "There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made masterpiece' (Macbeth, Act II).
>
> "The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance. . . ."

While this Court's decision on June 21, 1973, in Miller v. Calif., supra, and the companion cases to Miller, supra, have done much to correct the confusion, they have had no effect on the porno theater other than to cause those operations to be stepped up. In recognition of the thin 5 - 4 majority in this Court and the disastrous effect such rulings would have on the industry's survival, if fully implemented, the industry leadership has girded itself for battle with the intentions of grinding Miller v. Calif. into the dust. The Los Angeles Herald-Examiner of Feb. 10, 1974, reported the following from the San Diego Convention of the Adult Film Association of America:

> " 'There has been more explicit sex in theaters after the Supreme Court decision than there was before,' said David F. Friedman, president of the Adult Film Association. 'The Supreme Court decision merely drew more attention to adult films. The news media has also played a role,' he said. ' "Deep Throat" would have been just another explicit sex film which would have lived and died in a short time, except that the media picked it up and coined a new word (pornochic) which made it seem acceptable . . . .' "

The industry will certainly walk over this Court if the Court fails to give recognition to, and support the rationale of Justice Tom Clark in Kingsley International Pictures Corp. v. Regents, supra, when law enforcement elects to proceed against conduct alone under a specific statute similar to Georgia Code Section 26-2105.

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[20] This Court recently said in Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, 93 S Ct 2628, June 21, 1973:

> "The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . ."

(footnote continued on next page)

with sexuality, as codified by the state legislatures (see Appendix P at pages 2-16, is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971), affirmed in and *State of Ohio ex rel Keating v. Vixen*, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971) as adhered to on remand in *State of Ohio ex rel Keating v. "Vixen"*, 37 Ohio St.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

The foundation for this confusion in the motion picture area was laid in this Court's treatment of the Lady Chatterly's Lover's appeal, reviewing the refusal of the New York Court of Appeals in *Kingsley International Pictures Corp. v. Board of Regents*, 175 N.Y. Supp. 2d 681 (July 24, 1957) to license the film "Lady Chatterly's Lover" as violative of Sections 122 and 122(a) of the New York Education Law. *Those sections required the denial of a license to a motion picture*, "...the dominant purpose or effect of which is erotic or pornographic; or *which portrays acts of sexual immorality, perversion, or lewdness*, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. . . ." (Our emphasis)

Any opportunity for a logical development in the law that might have resulted from the June 21, 1973, decisions was completely destroyed by this irrational, illogical, preposterous, ridiculous, absurd, senseless, unreasonable and useless piece of dictum. Is this Court saying that hard-core pornography, which under federal law may not be imported, may have no property value, may not be copyrighted and which may not be sent interstate commercially, can nevertheless be given a legal status and value within a state? What of the expression in Roth-Alberts, 354 US 476, 485, 1 L.Ed.2d 1498, 77 S Ct 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained? Should not this Court be willing to explain away that statement by (1) backing into an acceptance of the Harlan view expressed in Alberts v. California, 354 US 476, at 500, and (2) admitting that what the Court was talking about was something less than hard-core pornography (reasonable men would not differ and could come to but one conclusion) and yet not quite protected speech. If the majority continues along this disruptive path, it will be underwriting another 15 years of chaos.

The 1959 Court reversed the New York Court's ruling in an opinion written by Justice Stewart. *Kingsley International Pictures Corp. v. Board of Regents*, 360 US 684, 3 L.Ed.2, 1512, 79 S.Ct. 1362 (June 29, 1959).[21] The issue as to "Lady Chatterly's Lover" was presented in the context of civil litigation - a licensing provision - which that Court, were it of a different bent, could have treated differently. Associate Justice VanVoorhis of the New York Court of Appeals, a

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[21] Associate Justice Stewart's opinion in Kingsley International Pictures Corp. v. Board of Regents, 360 US 684, 3 L.Ed.2d 1512, 79 S Ct 1362 (June 29, 1959), reversing the New York court's ruling (concurred in by Justices Brennan, Warren, Black and Douglas) is critically attacked by Terrence J. Murphy in his book, "Censorship: Government and Obscenity".

"The Court went out of its way to find in the New York statute a prohibition of nothing more than an abstract expression of an idea. By culling out of the opinion of the lower court and emphasizing such phrases as 'a proper pattern of behavior' Mr. Justice Stewart changed the New York law from a prohibition of the advocacy of sexual immorality plus obscenity to the prohibition of an intellectual discussion 'of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.' Mr. Justice Stewart notwithstanding, a movie advocating adultery and using all the techniques of sound, color and sight to depict or suggest obscene sequences is quite different both in its social effects and in its manner of presentation from a film presentation of Henry George's antiquated theory of a single tax. (Emphasis_____)

"The Court never met the argument that the state must protect 'order and morality.' New York argued that obscenity laws are ordered to the protection of the public interest in 'order and morality.' The corrupting influence on order and morality must be kept in mind in considering obscenity. To lose sight of the objective of the law by narrowly considering only the prurient appeal aspect of the obscenity law is to become so enamored with a means as to lose sight of the end. Obscenity is prohibited not just because it excites the sexual appetite but rather because such excitation has a 'corrosive effect upon the public sense of sexual morality.' The goal of the law is the protection of the public interest in order and morality. It cannot achieve this end if it does not concern itself with all the means by which the public order can be subverted. Consequently to hold as obscene that which is saturated with prurient sex while hold that material which advocates sexual immorality and is something less than saturated with prurient sex is not obscene is to close one avenue of attack on the community while opening up another route to the same destination. . ."

See clor, obscenity and public morality, 44-54.

dissenter in the state court below, would have solved the "thought control" problem which bothered Justice Stewart by holding at 175 N.Y. Supp.2d at 60:

> ". . .certain passages might have been eliminated as 'obscene' without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Division and the Regents seem to have *overlooked their power to exclude 'obscenity' which* includes the portrayal on the public screen of sexual intimacies *whether they be marital or extramarital*. . ." (Our emphasis)

Amicus submits that, had this Court's opinion in the "Lady Chatterly's Lover" case recognized the principle urged by Justice VanVoorhis, the producers of "Carnal Knowledge" would never have risked producing the acts of lewdness herein complained of. Further, the deluge of "lewdness" which now engulf the motion picture screens of this nation would not have appeared on the American scene. In his concurring opinion, Justice Tom Clark voiced a rationale somewhat similar to VanVoorhis, which was later to be followed by the New York Court of Appeal and elaborated upon in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964) and to find its way into Section 10 of the CDL Model Statute and ultimately into Section 26-2105 at page 1524:

> It may be as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 NY2d at 363, 151 NE2d 204, 205, 175 NYS2d at 50. And, as my Brother Harlan points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban* "pornographic" films, or *those that "portray acts of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court I believe it would*

have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters. For this reason, I would reverse on the authority of Burstyn. (Our emphasis)

Five years later, Justice Clark's statement of the law was adopted by a majority of the New York Court of Appeals as the principle under which a license was denied to the Swedish film "A Stranger Knocks". The latter film's only claim to fame was predicated upon two scenes depicting explicit sexual intercourse. The first took place on a beach. The second was a 2 minute scene of sexual intercourse, including climax, between the male lead lying on his back on the couch with the female lead astride and on top of him, but with both parties fully clothed and the female's skirt concealing the contact of the sex organs. Justice Burke, speaking for the majority in *Trans Lux Distributing Corp. v. Board of Regents* 248 N.Y.S.2d 857 (Mar. 26, 1974) expounded on that principle at great length.

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures. (*Thornhill v. Alabama*, 310 US 88, 60 S.Ct. 736, 84 L.Ed. 1093, *Joseph Burstyn, Inc. v. Wilson*, 343 US 495, 72 S. Ct. 77, 96 L.Ed. 1092, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restric-

tions on freedom of speech (Local Union No. 10, etc., *Plumbers Union v. Graham*, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (*Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834). For example, in *People v. Stover*, 12 N.Y.2d 462, 240 N.Y. S.2d 734, 191 N.E.2d 272, supra, app. dsmd. for want of a substantial Federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

"Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation' (*Giboney v. Empire Ice & Storage Co., supra*, 336 U.S. p. 501, 60 S.Ct. p. 690, 93 L.Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen. . . ."

and at page 860:

"In *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 2 L.Ed.2d 1512, the opinion of the court repeatedly distinguished between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S.Ct. p. 1365, 1 L.Ed.2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for con-

fusion, however, were a statute to ban "pornographic" films, or those that "portray *acts* of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court, I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' (350 U.S. p. 702, 79 S.Ct. p. 1372, 3 L.Ed.2d 1512; emphasis in in original).

"It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibitions as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledged, dissenting in *Roth v. U.S.* . . . .in contrasting books with conduct: 'I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (Emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws, c.40, §§ 43, 1140, 1140-a, 1140-B). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretations, never, obviously, the First Amendment. *(Miller v. People*, 5 Barb. 203; *People v.*

Burke, 243 App. Div. 83, 276 N.Y.S. 402, affd. 267 N.Y. 571, 196 N.E. 585; *People v. Mitchell*, 296 N.Y. 672, 70 N.E.2d 168; *People v. Dash*, 282 N.Y. 632, 25 N.E.2d 979.)

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive – more properly, obscene – displays of conduct whether in the street (Penal Law §§ 43, 1140 1140-b), on the stage (Penal Law, § 1140-a; *People v. Vickers*, 259 App. Div. 841, 19 N.Y.S.2d 165 – lewd dance) or on the screen (Penal Law §§ 1140-a, 1141; Education Law, § 122). These laws care not about the communication of ideas (see *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in *People v. Stover*, supra, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle

for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, *People v. Vickers*, supra, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law §§ 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious – that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., *Plumbers Union v. Graham*, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in *Roth v. United States*, 354 U.S. 476, 514 77 S.Ct. 1305, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle at page 863 is a fitting Memorial to Carnal Knowledge:

"To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared over-riding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

This Court was presented with a second opportunity to undercut the advance of pornography in the motion

picture industry during the 1964 October Term. Instead of granting a hearing and coming to grip with this very real issue in the Trans-Lux case, the 1964 Court chose instead to hear the appeal in *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (Mar. 1, 1965), struck down the Maryland Censor Board statute and summarily reversed *Trans-Lux*, citing *Distributing Corp. v. Board of Regents*, 380 U.S. 2d 59, 13 L.Ed.2d 959, 85 S.Ct. 952 (Mar. 15, 1965).[22]

Amicus submits that the Lady Chatterly's Lover case must be *re-examined*. The Federal questions spawned by that rationale present problems of infinite dimensions. If this Court does not roll back the pages of history to correct its omissions in the Lady Chatterly's lover case, there will be nothing to stop those scenes from next appearing on television.[23]

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[22] For failure of this Court to enunciate a judicial philosophy in conformity with traditional moral law, this Nation finds its public mores in the year 1974 – 15 years after the "Lady Chatterly's Lover" decision and 9 years after the "A Stranger Knocks" ruling – in a state of collapse, and the motion picture industry dominated by pornographers and ruled by anarchy. With Kingsley International Pictures Corp., supra, as the foundation, and this Court's inaction in Trans-Lux Distributing Corp., supra, providing the mortar, pornographers have constructed a modern-day version of the Tower of Babel within the motion picture industry.

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[23] On February 18 and 19, 1974, the daily newspapers reported on the abrupt dropping from ABC's schedule for Tuesday, March 5, 1974, the Movie of the Week, entitled "The Sex Symbol," allegedly for "Lavish hints of nudity, an aura of neurotic eroticism. . ." In commenting on the cancellation, Connie Stevens, the female star, who allegedly had engaged in the TV nudity, is reported to have said:

> " 'Can you imagine,' she asks. "Can you just imagine? People are turning my head around, saying, this will turn my career around as 'Carnal Knowledge' did Ann-Margret's. And I'm devastated.' "

Los Angeles Herald-Examiner article dated Feb. 18, 1974 and Los Angeles Times article dated Feb. 19, 1974, at Appendix Q, pages 3 and 4.

E. The Imposition of Criminal Sanctions Incident to a Violation of Section 26-2105 Raises no First Amendment Problems.

(1) THE FIRST AMENDMENT STANDARDS SET FORTH IN MILLER v. CALIFORNIA (WHICH INVOLVED AN APPLICATION OF THE CALIFORNIA GENERAL OBSCENITY STATUTE TO WRITTEN MATERIALS) HAS NO APPLICATION TO A SPECIAL STATE STATUTE WHICH REGULATES VISUAL FILMED CONDUCT AND WHICH PROVIDES THAT SPECIFICALLY DEFINED SEXUAL CONDUCT MAY NOT BE PHOTOGRAPHED ON FILM OR EXHIBITED PUBLICLY, AND THAT CRIMINAL SANCTIONS SHALL BE APPLIED AGAINST A PERSON WHO EXHIBITS SUCH FILMS WITH KNOWLEDGE THAT THE PROSCRIBED SEXUAL CONDUCT IS THEREIN DEPICTED.

When this Court stated in *Paris Adult Theatre I v. Slaton*, 413 US 49, 37 L.Ed. 2d 446, 464, 93 S. Ct. 2628 (June 21, 1973):

> "...in this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibitions of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene materials exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California*, supra, US at , 37 S.Ct. 2d 431. The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and *Miller v. California*, supra. . . ." (Our emphasis).

it mixed up apples (general obscenity statute involving *criminal* sanctions in *Miller)* with oranges (general obscenity statute in-

volving *prospective civil injunction in Paris Adult Theatre I)* and came by a result which engenders confusion. See Petition for Rehearing of Charles H. Keating, Jr. *in A Motion Picture Film Entitled Vixen, Russ Meyers, Eve Productions, Inc., Malibu Inc. and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr.*, No. 71-599, filed July 19, 1973.

Such inconsistencies, however, are of minor significance where the subject of the inquiry is the facial constitutionality of Georgia Code Section 26-2105, standing alone and independent of the "pari materia" statutory construction placed upon it by the Georgia Supreme Court (See "Introduction", supra, at page 35), for in such a case *Miller v. California*, supra and *Paris Adult Theater I v. Slaton*, supra, are inapposite.

On its face, Section 26-2105 makes no reference to the general obscenity statute "distributing obscene materials", Georgia Code Section 26-2105, which by its terms ("materials") encompasses a much wider area of activity such as writings, use of words, etc. Section 26-2105 is a special statute whose application not only is limited to conduct, but is further restricted to that type of conduct which is visual. Considered in the context of this case, that statute deals only with *pictorial conduct* and provides that specifically defined sexual conduct may not be photographed on film or exhibited, and that criminal sanctions shall be applied against a person who exhibits such film with knowledge that the proscribed sexual conduct is therein depicted. Considering Section 26-2105 by itself, and independent of the "pari materia" construction place upon it by the Georgia Supreme Court, it seems abundantly clear that the broad rule laid down by this Court in *Miller v. California*, supra, and *Paris Adult Theatre I v. Slaton*, supra, involving *obscene materials* cannot logically be applied so as to limit the applicability of that statute.

In his criminal law classes, Professor Rollin M. Perkins made constant use of the hypothetical to place the focus on an inconsistent line of reasoning, a procedure which is of particular value here. That learned professor might say: Suppose that the State of Georgia, with a sodomy statute like Georgia Code Section 26-2002 which provides:

> "A person commits sodomy when he performs or submits to any sexual act involving the sex organs of

one person and the mouth or anus of another. . .a person convicted of sodomy shall be punished by imprisonment for not less than one nor more than twenty years. . ."[24]

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[24] On November 5, 1973, this Court unanimously reversed Stone v. Wainwright, ___ US ___, 50 L.Ed.2d 179, ___ S Ct ___, and in so doing, wrote a "finis" to another broad attack on Judaeo-Christian morals (sodomy crime.) In the lower court in Stone v. Wainwright, 478 F.2d 390 (Apr. 29, 1973), the Fifth Circuit (Goldberg, Thornbury and Roney) had granted writs of habeas corpus to Stone and Huffman, who were serving 10-year sentences on Florida sodomy convictions. This Court reversed unanimously and, without the need for oral argument on the merits, held that the offense which is described as "the abominable and detestable crime against nature" put the defendants on clear notice that their conduct was criminal at the time the Statute had been construed.

More significant than this Court's ruling was the complexion of Stone v. Wainwright, which was being appealed to the U. S. Supreme Court. In Franklin v. State of Florida, 257 So.2d 21 (1971), the Florida Supreme Court had held the Florida Sodomy statute, unconstitutionally vague but, in reversing Franklin's conviction, the Florida Supreme Court also had ruled that the decision was not retroactive. On Stone and Huffman's petition for writ of habeas corpus, Federal District Judge McRae and the Fifth Circuit disagreed with the Florida Supreme Court, and granted the writ on the independent federal grounds that the Statute was void under the Federal Constitution.

In Amicus' view, the Florida Supreme Court, long recognized as a court which is committed to high public moral standards, (see Rhodes v. Florida, 283 So.2d 351 (Sept. 19, 1973)), was seduced by the lack of moral leadership and misdirection of this Nation's highest court. See Brinson v. State of Florida, 278 So.2d 317 (May 17, 1973) wherein the Florida District Court of Appeals, First District, refused to follow the direction of the Franklin case and reestablished the act of sodomy as a felony criminal offense under the general classification of "rape". Amicus submits that the sustained attack which has been made on the sodomy crime in recent years, see Stone v. Wainwright, 478 F.2d at 393, fn.6, would never have come about had the Justices of this High Court been more sensitive to public morals in their review of obscenity cases and more committed to "a return to the ancient, if somewhat discredited, concept of natural law." See Lovisi v. Slayton, Superintendent of the Virginia State Prison, 363 F.Supp. 620, at 624 (Aug. 31, 1973) and Lovisi v. Virginia, Nos. 71-965 and and 71-993, cert. denied in Lovisi v. Virginia, 405 US 1048, 31 L.Ed.2d 589, 92, S Ct 1313 (Apr. 3, 1972). Douglas would grant cert. The indirect tolerances of films like "Deep Throat," "The Devil In Miss Jones" and "Behind the Green Door" which depict repeated acts of sodomy is unnatural, scandalizing and solicits disruptive legal attacks on, what has always been accepted as, fundamental moral standards, of the nature made in Stone v. Wainwright and by Billy Jenkins in his operation of the Broad Avenue Cinema, described herein at pages 16-17.

were to direct its legislative efforts toward controlling the plague which pornographic films like "Deep Throat" [25] have cast upon the nation, by adding a new subsection to Section 26-2105 reading:

> "26-2105(x) Every person who, during the course of a. . .motion picture. . .production . . . engages in conduct wherein said person, as an actor, performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . shall be guilty of participating in indecent exposure and upon conviction shall be punished as for a misdemeanor. . ."

and by adding a new subsection to section 26-2105 reading:

> "26-2105(y) Every person who. . .knowingly exhibits or . . .assists in the exhibition of a motion picture containing the conduct described in Section 26-2105 shall be guilty of a misdemeanor. . ."

And suppose further, that John Doe thereafter exhibits "Deep Throat" with knowledge of its contents and is thereafter indicted and convicted on a specific grand jury charge of violating Georgia Code Section 26-2195(y)," in that he did with knowledge of the contents exhibit a film containing conduct wherein one female, identified as Linda Lovelace, did perform multiple acts of oral sodomy by the use of her mouth on the penis of other male actors, which conduct was continued to the point of ejaculation." query: Would it have been error for the trial judge to fail to instruct on the definition of obscene material set forth in Georgia Code Section 26-2101(b), as that definition may be affected by *Miller v. Calif.*, et al, supra? If this Court answers "yes", Amicus would further inquire why this must be so, where the hypothetical statute and charge has nothing directly to do with the general obscenity statute.

Is this Court willing to say that, on the above facts, the jury must nevertheless be instructed on "prurient interests",

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[25] See Brief Amicus Curiae of Charles H. Keating, Jr. in Paris Adult Theatre I v. Slaton, No. 71-1051, and the Time-Motion Study of "Deep Throat" at Appendix C-1 thru C-29, depicting 62 minutes of multiple acts of oral sodomy exemplified by photos 529-558 therein, depicting oral copulation of a male penis in the mouth of a female.

"patently offensive way", and "serious literary, artistic, political, or scientific value "before it can return a guilty verdict? If this Court answers "yes", Amicus then would ask, "Does not the feloneous crime of sodomy make the act "patently offensive" as a matter of law? Further, of what probity is "serious literary, artistic, political or scientific knowledge", except as a possible affirmative defense in a proper case? See Section 2 of the CDL Model Obscenity Statute at Appendix F, page 4, and Comments on the Model Obscenity Statute Appendix G, page 5-6, and 10.

Amicus submits that, for this Court to hold that Section 26-2105(b) is facially invalid and may not, in the light of constitutional standards, be applied independently of the general obscenity statute is without basis in legal or ordinary logic and, if acceded to by this Court, would compound the existing confusion.

(2) GEORGIA CODE SECTION 26-2105 PROVIDES FAIR NOTICE TO A FILM EXHIBITOR THAT HIS PUBLIC AND COMMERCIAL ACTIVITIES MAY BRING PROSECUTION.

In *Rabe v. Washington*, 405 US 313, 31 L.Ed. 2d 258, 261, 92 S.Ct. 993 (Mar. 20, 1972), this Court reversed an obscenity conviction on the grounds that "the Statute, used to support the conviction had not given 'fair notice' that the location of the exhibition was a vital element of the offense." In further explanation of that principle, this Court said in *Miller v. California*, 413 US 15, 37 L.Ed. 2, 419, 432, 93 S.Ct. 2607 (June 21, 1973).

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. . ."

Georgia Code Section 26-2105 contains no such infirmities as were present in Rabe, supra, and satisfies the "fair notice" requirements of this Courts' decisions on June 21, 1973.

The conduct which is made illegal by Georgia Code Section 26-2105 is described as conduct which would be public indecency under Section 26-2011. Section 26-2011 describes four specific acts which come within the Statutes proscription, namely:

(a) An act of sexual intercourse
(b) A lewd exposure of the sexual organs
(c) A lewd appearance in a state of partial or complete nudity
(d) A lewd caress or indecent fondling of the body of another person

There can be little doubt that such language satisfies the requirement that the conduct be specifically defined. The very purpose of the 1968 Amendment, under which the specific language was first introduced to the Code Section, was "to substitute explicit conduct which falls within its proscriptions for the rather vague 'tending to debauch the morals' formerly employed." See Committee Notes on Chapter 26-20 appearing in Georgia Code Ann. Section 26-2011 at page 153.

Except for the act of sexual intercourse, the designated acts must be performed in a lewd manner before they constitute public indecency. The term "lewd" has a well defined meaning under the law and its use in a "conduct statute" raises no substantial federal question. See *Piercy v. Georgia*, 92 Ga App. 599, 600 (1955); *Evans Theatre Corp. v. Slaton* 180 S.E. 2, 712 at 715, citing *Chaplinsky v. New Hampshire* 315 US 568, 571-572, 62 S.Ct. 766, 86 L. Ed. 1031.

Any question as to whether, under state law, the proscription as to an "act of sexual intercourse" included simulated sexual activity was fully answered in *Slaton v. Paris Adult Theatre I*, 185 S. E. 2d 768 at 770, (November 5, 1971):

> Appellee also contends, and the trial judge so found that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter

case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment.

II.

GEORGIA CODE ANNOTATED SECTION 26-2101, AS CONSTRUED AND APPLIED BY BOTH THE GEORGIA TRIAL COURT AND THE GEORGIA SUPREME COURT, DOES NOT VIOLATE THE FEDERAL CONSTITUTION.

A. Jenkins was Accused and Tried by the State of Georgia on a Violation of Georgia Code Section 26-2101(a). He was not Accused nor was he Tried on a Violation of Georgia Code Section 26-2105(b).

As previously observed, at pages 32-33, under Point I of this Brief, while it is true that Jenkins was arrested on Feb. 10, 1972, on a charge of violating Georgia Code Section 26-2105 (J.A.6), he was neither indicted by the grand jury nor tried by the petit jury on that charge. Instead, he was indicted by the March Term of the Grand Jury on an accusation of "Distributing Obscene Materials" [28] (J.A. 7,8)–a violation of Section 26-2101(a) of the Georgia Code. If he had been ac-

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[28] As correctly noted by Appellant in his Brief at page 35, footnote 44, section 26-2101(b) and sections 26-2105(a) and 26-2105(b) are separate, statutory crimes having separate and different penalty provisions. Appellant is incorrect, however, when he concludes thereafter that "it is impossible to determine which provisions now govern." When Section 26-2105 functions as a criminal statute proscribing conduct, the Section 26-2105 penalty provisions control. When Section 26-2105 functions as a specific standard of conduct in the determination of whether any given material is obscene or not under the general obscenity statute, the Section 26-2101(d) penalty attaches.

cused by the Grand Jury of the separate crime described in Section 26-2105, the issues upon the trial would have been entirely different.[27] In as much as the Grand Jury Indictment as framed, did not present that particular problem (where the indictment would be against conduct alone, under section 26-2105, and not in relation to "distributing obscene material,"), the Georgia Supreme Court did not consider it. Therefore, neither the facial validity of Section 26-2105 nor its application to the film "Carnal Knowledge" can be made the foundation for this appeal. (See Statement of Facts, supra, at page 7)

The Brief for Appellant is in error when it states at page 30: "Appellant was charged with and tried for a violation of Georgia Code Annotated, section 26-2105" and at page 43, that "Appellant was accused only of violating Georgia Code Annotated section 26-2105 (exhibition of a film portraying acts which constitute 'public indecency')." As noted above, Appellant was charged with and tried for a violation of Georgia Code section 26-2101(a). The jury instruction as to Georgia Code section 26-2105 (and as to the other criminal statutes governing *conduct*, sections 26-2101(c) and 26-2011) was given for the purpose of informing the jurors on the *specific standards of conduct* set for the state community by the State Legislature. That statement served as a guidepost for the jurors deliberations on the general charge of distributing obscene material.

Appellant's error in this regard is twofold. First, he refuses to read the plain language of the accusation and the trial judge's instructions as meaning what they say. Secondly, he refuses to acknowledge that the rationale of this Court's decision in *Miller v. Calif.* 413 US 15, 37 L.Ed.2 419 at 431,

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[27] For an example of the type of trial which could result from a grand jury accusation under Georgia Code Section 26-2105, as that section was intended by its author to operate, see the hypothetical example set forth at pages 52-55, supra. The answer to those who might argue that this is a retreat to the Hicklin rule appears in the basic principle expressed by Justice Burke's opinion in the Trans-Lux case, set forth at the bottom of page 49 and at page 12, footnote 9. Where the triable issue is narrowly focused on conduct, the confusion in values alluded to at footnote 21 on page 43, disappear.

93 S. Ct. 2607 (by mandating that the trier of fact must be given basic guidelines as to what sexual conduct is specifically defined as patently offensive) has confirmed the correctness of the construction given the Georgia Statutes by the trial court, and his manner of instructing the jury. In casting the spotlight upon the entire framework of morality laws, the *Miller* decision has unearthed one very basic and obvious principle, and that is, that all morality legislation functions in two separate capacities. As criminal legislation, such statutes "proscribe" certain conduct as illegal. At the same time, such legislation in its written form (being the enshrinement of the voice of the people) "prescribes" – that is, lays down a guide which can and must be given to the jury in proper cases to be used by them as litmus paper in arriving at their factual determinations on a general obscenity charge.[28]

Nor can Jenkins claim that he was not aware that he was being charged with a violation of Section 26-2101(a). His entire defense, consisting of the sworn testimony of Ed Lightsey, B. C. Gable, Barbara Folsom, Joan Singletary, and his own unsworn statement (see pp. 25-29) was aimed at establishing proof of "community standards" which would

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[28] Webster's Collegiate Dictionary, Fifth Edition, defines proscribe as . . . "to outlaw . . . To denounce and condemn;" prescribe as . . . "to lay down as a guide, direction or rule of action."

In the Brief Amicus Curiae of Charles H. Keating Jr. in Paris Adult Theatre I v. Slaton No. 71-1051, at pages 89-93, (See copy, herein, at Appendix R, pages 3-7) Amicus urged this basic principle upon the Court in a different context. There Amicus urged the Court to take judicial notice of the "guidelines" established by this nation's morality (sexual) laws (as the Ohio Courts have done) and apply the same (see Appendix P at pages 2-16) as a standard in affirming "Magic Mirror" and "It All Comes Out In The End" as obscene under federal standards. This Court rejected that proposal and, instead, sent all of the obscenity cases which were before it back to the state courts below with a directive that they perform that task either through judicial construction or legislation, without actually explaining how it was to be accomplished. Whether that action amounts to a national scandal which has added a nail to this nation's coffin, or was brilliant planning which, with further refinements, will start this nation moving in the proper direction, will be decided by the manner in which this Court writes its opinion in this appeal. The trial judge applied the law as this Court said it should be applied. The question is, will this Court <u>now</u> start construction upon this solid foundation?

win him an acquittal. He made no attempt in either the sworn testimonial evidence of others or in his own unsworn statement to offer proof on a defense to Section 26-2105(b), such as, that the film did not contain acts which could be held to be public indecency or that he had no knowledge of the portrayal of such acts in the film itself.

Finally, the judge's instructions to the jury were clear that he was being tried on a Georgia Code Section 26-2101 accusation. (J.A. 26-30) see Joint Appendix at page 26:

> "Gentlemen of the Jury, an accusation has been returned accusing this Defendant of the offense of distributing obscene material. You will have the accusation out with you. It is not evidence, but you may refer to the accusation if you care to do so containing as it does the contentions of the State. . . ." (Our emphasis.)

and Joint Appendix at page 30:

> "A person commits the offense of distributing obscene material when he sells etc. . . ." Contents of Georgia Code Section 26-2101(a).) (Our emphasis.)

B. In His Instructions on the Law Governing the Substantive Crime of "Distributing Obscene Materials," the Trial Judge used the very Principles now Mandated by This Court's Decision in Miller v. Calif. Et. Al.

The trial judge's instructions on the substantive crime of "distributing obscene materials" are embodied in the seven paragraphs which appear at pages 30-31 of the Joint Appendix. Those instructions to the jury as the "trier of fact" fully comport with the rule of law handed down by this Court in *Miller v. California, supra*, at page 431, that:

> "The basic guidelines for the trier of fact must be . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ." (Our emphasis)

Analytically speaking, the trial judge's instructions were structured in seven integrated parts:

1. A statement as to what the elements of the offense of "distributing obscene materials" were, and what factual issues were before the jury for its considera-

tion, framed in the language of Georgia Code Section 26-2101(a). [29]

2. A statement as to the statutory test for "obscene material," framed in the language of Georgia Code Section 26-2101(b).
3. A statement as to the *specific standard of conduct* relating to the commercial exploitation of erotica solely for the sake of its prurient appeal and its consequences where found to exist from the evidence prescribed by Georgia Code Section 26-2101(c).
4. A statement as to the *specific standard of conduct* which forbids the photographing on film of conduct which would be public indecency, if performed in a public place, prescribed by Georgia Code Section 26-2105(a).
5. A statement as to the *specific standard of conduct* which forbids the knowing exhibition of films containing conduct which would be public indecency if performed in a public place, prescribed by Georgia Code Section 26-2105(b).
6. A statement as to the *specific standard of conduct and acts* which, when performed in a public place, constituted public indecency under the law, prescribed by Georgia Code Section 26-2011, and
7. A precautionary instruction to the effect that *the question before the fact finders "is not whether the particular publication depicts sex or sexual acti-*

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[29] The constitutionality of Georgia Code Section 26-2101(a) is beyond question. Gable v. Jenkins, 309 F. Supp. 998, affirmed on the merits 397 US 592, 25 L.Ed.2d 595, 90 S.Ct. 1351 (April 20, 1970). In Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446,453, 93 S.Ct. 2628 (June 21, 1973) this Court made the following comment on the constitutionality of Georgia Code Section 26-2101 at footnote 1:

"The constitutionality of Georgia Code Section 26-2101 was upheld against First Amendment and due process challenges in Gable v. Jenkins, 309 F. Supp. 998 (N.D.Ga. 1970), aff'd per curiam, 397 US 592, 29 L.Ed.2d 595, 90 S. Ct. 1351 (1970)."

See also Slaton v. Paris Adult Theatre I, 201 S.E.2d 456, 459 (Oct. 30, 1973) affirming, upon remand from this Court, the Georgia Supreme Court's previous construction of Section 26-2101(a).

vities,[30] *but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore defined such limits as to take the movie outside the protection of the person involved." (Our emphasis.)*

Under the trial judge's first two statements, noted above, the jury (1) was informed that the nature of the accusation was that of knowingly exhibiting obscene material and (2) was given the definition of the term "obscene material" (J.A. 30). During the case in chief, the jurors had viewed the film "Carnal Knowledge" which contained several scenes depicting explicit sexual activity. Two examples of such depictions are:

(a) Scene 37 (See Continuity at A-78 thru A-84 and Time-Motion Study at B-24 thru B-27) which presented a five minute scene in which a prostitute Louise performed fellatio (simulated) on Jonathan in his apartment). Of those five minutes, 2 1/2 minutes are devoted to the depiction of the felonious act of sodomy itself. (See A-80 thru A-84 and B-24 thru B-27 at Photographs 701-756.)

(b) Scene 6 (See Continuity at A-14 thru A-15 and Time-Motion Study at B-4 thru B-5) which presented a 23 second scene in which Sandy is shown placing his hand on Susan's breast, after telling Jonathan that he was going to "feel her up" and a one minute scene in which Susan herself takes Sandy's hand and places it on her breast. (See A-14 thru A-15 and B-4 thru B-5 at Photographs 67-69 and 77-96).

In view of such trial facts indicating explicit sexual activity on film, it became the duty of the trial judge to instruct the jury on those specific standards of conduct set by the Legislature which bore a relationship to the explicit sexual

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[30] This precautionary instruction clearly demonstrates that the Court was not instructing the jury on the substantive crime set forth in Georgia Code Section 26-2105(b). In an indictment for a violation of Section 26-2105, such as along the lines of the hypothetical case set forth at pages 52-55, the instruction noted here would have been an incorrect statement of the law.

activity on film. In deliberating upon the Grand Jury accusation against Jenkins of "distributing obscene material" (Section 26-2101(a)) the petit jury was faced with the duty of making a number of factual determinations which included (1) a determination of and application of community standards to the film; (2) a determination of what, under those standards, constituted a shameful or morbid interest in nudity, sex or excretion, and (3) a determination of what were the customary limits of candor in describing or representing such matters. As a part of the law on those questions, the jury was entitled to be informed as to the legislative voice of the people, regarding the public exhibition of films showing:

(a) an act of sexual intercourse, and

(b) a lewd caress or indecent fondling of the body of another person.

as enshrined in Senate Bill 108 and Section 26-2105(b).

One of the issues for the jury to resolve was whether or not Jenkins had "knowingly exhibited an obscene film. As a part of the instruction on Section 26-2101, the jurors had been told that "knowingly":

> "As used herein shall be deemed to be either actual or constructual knowledge of the obscene content of the subject matter and the person has constructive knowledge of the obscene content if he has knowledge of the fact which would put a reasonable and prudent man on notice as to the suspected nature of the material. . ."

Other evidence was that Jenkins had made an unsworn statement, as follows: (Statement of Facts, supra, at page 28)

> "As far as the motion picture 'Carnal Knowledge' is concerned, I have no knowledge of this motion picture being obscene or *breaking any state or local law because of its content*. . ." (Our emphasis.)

The rebuttal evidence of Investigator Lynn Stout was: (Statement of Facts, supra, at page 30) that some time after July 1, 1971, he started making an investigation of the Broad Avenue Cinema and other theaters and took photographs of the content of the public screen. He thereafter identified 9

photos of explicit sexual activity photographed at Jenkin's Theater on July 4, 12, 14 and 22nd, which were offered by the State of Georgia as impeachment on the question of "knowledge". It was also made known to the jurors, by stipulation that "Carnal Knowledge" had previously been shown at the Martin Theater and that the same had been seized under a search warrant and an agreement had been entered into whereby the picture was not to be shown in Albany, Georgia unless there was a judicial determination. In view of the trial facts indicating a course of conduct regarding explicit sexual displays, and a willingness to show a film which was being challenged for its sexual content, the jury was entitled to be informed as to the legislative voice of the peoples regarding the "commercial exploitation of erotica solely for the sake of their prurient appeal." Section 26-2101(c).

Appellant's objection to the charge at page 32 of his Brief, that:

> "The trial judge's instructions to the jury encompassed three, separate, distinct and substantially different statutes, all of which were applied unconstitutionally in this case . . . ."

blinks at reality. It is not error for the trial court to read statutes in its instructions if the statutes read are pertinent, are justified by the evidence, and where their meaning as applied to the facts in the case is not susceptible of more than one construction. 88 C.J.S. Section 337 Trial, at page 881-882. The latter requirement was met by the precautionary instruction to the effect that:

> "The question present with regard to the obscenity of the movie herein is not whether the particular publication depicts sex or sexual activities, but the question is whether the movie can be said to be obscene within the narrow limits as the law has heretofore defined such limits as to take the movie outside of the protection of the person involved."

The reference to "sex or sexual activity" can have but one application and that is to the conduct statutes (sections 26-2011, 26-2101(c), 26-2105(a) and 26-2105(b)) which

make no mention whatsoever of the legal term "obscene movie."

Appellant's difficulty is that the trial judge and the Georgia Supreme Court construed the network of statutes regarding sexual conduct and obscene materials in pari materia, which is a display of the utmost common sense. See footnote 28. Appellant's "divide and conquer" approach, should not be permitted to defeat the most practical development [31] in the law of obscenity in 15 years (since *Roth-Alberts*, 354 US 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 22, 1957).

C. The Trial Judge's Instruction That the Jury was to Apply "Community Standards" did not Violate the Federal Constitution.

The trial judge instructed the jury in the terms of the statute, Georgia Code Annotated, Section 26-2101(b): (J.A.30)

"Material is obscene if considered as a whole,

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[31] Amicus submits that, properly implemented, this Court's opinions in Miller v. California et al., supra, as implemented herein could eventually lead the way out of the forest. (See Interest of Amicus at p. 3.) If obscenity is to be brought under control, the determiners of fact, be they judge or jury, must bring their sights to bear on what truly are the "standards of conduct" which they are called upon to use as a litmus. The trial judge construed the obscenity statutes as a whole, which had the effect of instructing the jury on the moral standards of the state. As previously noted in another context at Point IA (p 33), it beggars logic to say that an act of sodomy is punishable as a felony and, at the same time, hold that a pictorial display of oral sodomy, real or simulated, may not be reached by legal sanctions. Similarly, it would be equally as illogical to hold that, in a trial on a general obscenity charge involving a film like "Deep Throat," which depicts 62 minutes of multiple acts of oral sodomy (see footnote 25), that it was improper for the trial judge to instruct as a specific standard of conduct that the jurors might consider on the issue of "standards of the community" the fact that the State Legislature had declared the act of sodomy to be a felony, subject to 10 years imprisonment. For the same reason the trial judge in Jenkins properly read as a standard of conduct, the legislative command of Section 26-2105(a) that the act of sexual intercourse was not to be photographed, and the legislative command of Section 26-2105(b) that the act of sexual intercourse was not to be exhibited (J.A. 31) and the legislative command of Section 26-2011 as to what constituted "public indecency" and the legislative command of Section 26-2101(c) as to what constituted pandering.

applying community standards. . ." (Our emphasis) Appellant's claim that the trial court should have defined community standards as being in the nation as a whole (J.A. 45) has already been rejected by this Court in *Miller v. Calif.* 413 US 15, 37 L.Ed.2d 419, 435 93 S.Ct. 2607. In the Miller case, Chief Justice Burger, writing for the majority of the Court, cited with approval the very language used by the trial court:

> We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. Chief Justice Warren pointedly commented in his dissent in *Jacobellis v. Ohio, supra,* 378 US, at 200, 12 L.Ed 2d 793:
>
> *"It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards* - not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one." (Our emphasis).

The Georgia Supreme Court has since indicated in *Slaton v. Paris Adult Theatre I,* 201 SE 2d 456 (Oct. 30, 1973), that the standard for *appellate review* under Georgia law is a state standard. The latter decision places Georgia law squarely within the protection of the Miller decision.

There is no substance in appellant's claim that the trial court in Dougherty County, Georgia must, in the first instance, instruct the jury in terms of a state standard. There is no reason to suspect that the standards of Dougherty County are any different from those in any other county in the State of Georgia or the nation as a whole. In fact, one New Jersey Appellate Court has held that it was to be presumed that the community standards were the same. See *New Jersey v.*

Hudson County News Co., 78 N.J. Super 327, 188 A2d 444 (Feb. 20, 1963), reversed on other grounds (search and seizure) in 196 A2d, 225 (Dec. 16, 1963):

> "In making those findings and reaching those conclusions we have applied contemporary standards of decency.
>
> Defendants argue that the standard to be applied is a national one since federal constitutional provisions are involved, and that error was commited at the trial because the testimony and court's charge 'regarded the community standard as that of Hudson County.'
>
> We find that the trial court did not apply an improper standard. It is to be presumed that the community standards of morality in Hudson County are the same as those in any other county in the State or Nation. A county is a recognized subdivision of a state. Unless it is demonstrated that the standards of morality in Hudson County are different from those in comparable political subdivisions, it cannot be said that improper standards were applied."

Further, Appellant, in failing to present that question in the state court proceedings below, has failed to raise a substantial federal question for this Court's jurisdiction. *Zucht v. King* 260 US 174, Supreme Court Practice, Stern and Gressman, Fourth Edition at p. 116.

D. Georgia Code Annotated Section 26-2101 as Construed and Applied by the Georgia Supreme Court does not Violate the Federal Constitution.

As heretofore stated, the trial judge instructed the jury, not on the proscription of section 26-2105, standing by itself, but on the general obscenity charge, section 26-2101(a) together with the statutory definition for "obscene matter", set forth in section 26-2101(b) *and the specific standards established in Georgia Code Section 26-2105 as such standards bore on the general obscenity charge.* The Georgia Supreme Court did likewise, in *Jenkins v. State*, 199 SE2d 183, noting, at page 184 that:

> "The accusation charges the defendant 'with the offense of distributing obscene material'."

and holding;

". . .The chapter in which Code Annotated section 26-2105 is included at its very beginning amply defines obscenity and this particular code section, which is merely a part of the chapter, must be read in accordance with the entire chapter. This Court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87, 84 S.E.2d 81. It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question. . ."

In construing the "conduct" statutes to be read in "pari materia" with the general obscenity statute, the Georgia Supreme Court fulfilled the requirements of this Court as stated in *Miller v. Calif. supra* (see footnote 28). Except for the recent Miller refinements, the constitutionality of the Georgia Statute has already been established. See *Gable v. Jenkins*, at footnote 29, supra.

III

JENKINS' CONVICTION DOES NOT OFFEND ANY RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION.

A. Where the State Law as Written or Authoritatively Construed Meets the Basic Requirements Established in Miller v. Calif., This Court Should Affirm the Judgment if the Subject Matter Taken as a Whole is Reasonably Found in the State Judicial Proceedings to Treat With Sex in a Fundamentally Offensive Manner (Harlan, Concurring in Jacobellis v. Ohio).

In *Miller v. Calif. et al., supra*, this Court's obscenity decisions took a sharp turn in course from the direction in which they had been proceeding. Over night, all of the hurdles which had been constructed against law enforcement were removed and the pornographers awoke on June 21, 1973, to find themselves stripped of their defenses (see "The Legal Problems as Viewed by State Government, supra, at pages

9, 10). In spite of the braking action which this Court has applied the expected positive gains have not been achieved (see Footnote 19, supra). Nor will they until one conspicuous contradiction in those decisions is corrected (see Footnote 20, supra).

What is urgently needed is the application of a gyro correction to bring this Nation's courtrooms back on course. That opportunity now presents itself – and with a minimum of confusion. Amicus submits that the course to steer, which this emergent condition requires, is in the direction of full reliance upon the rule of law expressed by Justice Harlan in his concurring opinion in *Roth-Alberts*, 354 US at 497-498, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957).

One of the principle questions before this Court is the matter of how this Court will conduct itself in the future, in reviewing the final results achieved by a state judicial system which has placed the new *Miller* requirements for specificity into operation. The alternatives are: (1) a resumption of the role of, what Amicus suggests is, dictatorial censorship at the hands of the judiciary (see Footnote 18),[32] or (2) a commitment to the common sense view espoused by Justice Harlan, accompanied by a return to the state judiciary of the basic power to supervise public morality which, Amicus submits, was ever the intention of the founding fathers. The stage was set for this transfer of power when, in *Miller v. Calif.*, 413 US 15, 37 L.Ed.2d 419, 431, 93 S. Ct. 2607, this Court held:

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois v. Wisconsin, supra*, 408 US at 232, 33 L.Ed.2d 312 (1972); *Memoirs v. Mass., supra*, 383 US at 459-460, 16 L.Ed.2d 1 (1966) (Harlan, J. dissenting); *Jacobellis v. Ohio*, 378 US 184, 204, 12 L.Ed.2d 793, 84 S.Ct.

[32] See footnote 36.

1676 (1964) (Harlan, J. dissenting); *New York Times Co. v. Sullivan*, 376 US 254, 284-285, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 ALR 2d 1412 (1964); *Roth v. United States, supra*, 354 US at 497-498, 1 L.Ed.2d 1498 (1957) (Harlan, J. concurring and dissenting).

B. The Georgia Judicial System was Justified in Affirming Jenkins' Judgment of Conviction Below.

In *Kois v. Wisconsin*, 408 US 232, 33 L.Ed.2d 312 (1972), (cited with approval in *Miller v. Calif.)* this Court, in holding that the dominant theme of the poem in a newspaper did not appeal to prurient interest, noted that:

> "In this case, considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art. . . ."

No such defense can be made of the subject matter and the facts on record herein.

1. Jenkins' Conviction Should be Affirmed on the Grounds That the Motion Picture Film "Carnal Knowledge" was Reasonably Found to Treat Sex in a Fundamentally Offensive Manner.

This Court cannot shut its eyes to reality and to the fact that the real party in interest in this appeal is not Billy Jenkins, who perhaps couldn't care less, but AVCO Embassy Pictures Corporation, the producer, Joseph E. Levine, the executive producer, Michael Nichols, the director, and the Motion Picture Association of America Inc.[33] The issuance of

[33] The Motion Picture Ass'n. of America is well know as an association of persons within the motion picture industry, which maintains and operates a nationwide voluntary film rating program for motion picture films, produced or distributed by members of the association and their subsidiaries and others. The M.P.A.A. rating program is administered by a Code and Rating Administration and Code and Rating Appeals Board, which reviews and rates motion pictures as to their conformity with the standards of a Code of Self Regulation. "Carnal Knowledge" was submitted by its producers to the Code and Rating Administration which issued an "R" rating and required the same, and the official seal of the Motion Picture Ass'n. of America, to be imprinted upon an introductory frame of each motion picture print thereof.

of an "R" rating and its incorporation into the film print was intended by those producers and their agents to be a representation that, applying contemporary community standards, "Carnal Knowledge" was and is suitable film fare for: (1) persons 17 years of age and over, and (2) persons under 17 years of age when accompanied by parents or adult guardians. By its verdict in this case, the jury in Albany, Georgia, thought otherwise. So did a majority of the Georgia Supreme Court. To upset those judgments would lend encouragement to a disturbing development which has been taking place in the area of motion picture films.

The commercial enterprise, which the motion picture industry represents, is engaged in a life and death struggle for the entertainment dollar. What was once a proud industry, enjoying a veritable monopoly insofar as the field of public entertainment is concerned, now finds itself pushed into the background by other forms of entertainment such as TV and sports, etc. Unfortunately for the industry and public morals, the average person no longer finds it necessary to leave his home for public entertainment. As a result, the movie moguls, whose primary concern is the corporate dollar, now find it necessary to concentrate their efforts on the type of entertainment which is not yet available to the general audience on the television screen[34] – the theme with a sensationalized sex appeal. Although the promotion vehicle herein is slightly different from that employed by the typical porno producer, and certainly the camouflage is less apparent, nevertheless the effect is the same. Although the admission price to "Carnal Knowledge" and similar films can be expected to return less than that of the typical porno theater, the potential audience of 17 year olds and over more than compensates for the difference, and makes such productions a business imperative – so long as the industry can get away with it in the courtroom. Both operations amount to one and the same thing – a capitalization on the appeal to prurient interest for the sake of commercial profit.

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[34] See footnote 23.

In characterizing the dominant theme of "Carnal Knowledge" as pornographic, Amicus does not suggest that it belongs in the same general classification as "Deep Throat". On the contrary, its technical excellence and potential audience sets it into a classification which is more destructive. Nor can it be urged that technical excellence is an exculpating factor. See Justice Harlan's view of the test on appeal in *A Book Named Memoirs v. Attorney General of the Commonwealth of Mass.*, 383 US at 459-460, 16 L.Ed.2d 1 86 S.Ct. 975 (Mar. 21, 1966) (cited with approval by this Court in *Miller v. Calif.*):

> "I think it more satisfactory to acknowledge that on this record the book has been shown to have some quantum of social value, that it may at the same time be deemed offensive and salacious, and that the State's decision to weigh those elements and to ban this particular work does not exceed constitutional limits. . . ."

Even so, the technical qualifications of "Carnal Knowledge" are not all that valuable. Consider here the criticisms made by Studs Terkel in reviewing "Carnal Knowledge" for the Chicago Daily News on July 24-25, 1971, a copy of which review appears on the opposite page. Mr. Terkel writes:

> "Carnal Knowledge is a masterpiece in slick packaging. That there is nothing inside, nothing other than the *illusion* of something is of small consequence to the box office. And that's what Show Biz is all about. The tragedy lies not in this film, but in its being taken seriously as a profound comment on men and women . . . .
>
> "But in this work, the only area of making out is the bed. We know nothing of how Clown I makes out as a lawyer or Clown II as a doctor, other than that money is no problem. . . .
>
> "Of them, we know absolutely nothing; of their privates we know everything. And thus nothing. Nothing, because we know nothing of them as humans.
>
> "Were this a film about a stallion, a bull, a rooster, or a hog, it could pass as a good exhibit in Biology I; and be especially helpful as a training film in agricultural

A dissenting report on Mike Nichols' 'Carnal Knowledge'

By STUDS TERKEL

Jack Nicholson, in a scene from "Carnal Knowledge," in which he plays the role of a successful young man who is impotent with women.

And a defense of the director and his movie

By DAVID ELLIOTT

schools. But is purportedly concerned with men and women.

"That there are such men, such women, may be a fact. That there is a Playboy 'philosophy' is also a fact. That these facts express a truth is untrue. For truth about our species homo-sapiens, must concern itself with possibilities, unfilfilled, lost somewhere along the way. No such possibilities made themselves felt in this film. Thus, caricatures, rather than flesh and blood men and women appear on the magic lantern."

Even the defense to the Terkel review also appearing on the same page of the Chicago Daily News acknowledged that the audience was repeatedly assaulted by variations on the same theme:

"Clearly it's a double-headed coin. If you don't care for being repeatedly assaulted by variations on the same theme, then the film will run down rather than progressively build up. . . ."

The question before this Court *on appellate review* is whether or not "Carnal Knowledge" taken as a whole, can be said to treat sex in a fundamentally offensive manner. See *Jacobellis v. Ohio*, 378 US 184 204, 12 L.Ed.2d 793, 807, 84 S.Ct. 1676 (Harlan dissenting). Justice Harlan in his dissenting opinion phrased his test for constitutional review to be as follows (cited with approval in *Miller v. Calif.*):

"In truth the matter in the last analysis depends on how particular challenged material happens to strike the minds of jurors or judges and ultimately those of a majority of the members of this Court. . . .I would apply to the Federal Government the Roth standards as amplified in my opinion in Manuel Enterprises, supra. *As to the states, I would make the federal test one of rationality. I would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such materials . . . ." (Our emphasis.)*

The answer to whether or not the producers and directors of "Carnal Knowledge" were capitalizing on "an appeal to the prurient interest" and whether the subject matter treated sex in a fundamentally offensive manner can only be determined by this Court after an intelligent analysis of the film's integral parts. As in the case of hard-core pornography, those answers must come from the subject film itself.

When called upon in conference to give thoughtful consideration to such analysis, as a collective body, the members of this Court are faced with a communication problem arising out of the nature of motion picture films. Because the visual and audio facts of any film move too rapidly for the mind, it is impossible after only one viewing, to focus on detail, recall film facts with accuracy and communicate one's observation to one another. Questions which this Court must ask such as: "Does the inclusion of an oral Sodomy scene have a substantial tendency to disprove or corrupt the audience at whom it is aimed when examined in the light of Pavlov's principle or the principles espoused in Pope's "Quatrain on the Monster Vice." "Why was the visual assault of an oral sodomy scene employed by the director?" "Why was it so long?"..."Could it not have been done in another way without offending the express provisions of the statute?" "Why was it not omitted in its entirety?" and "Was it offered as a foot in the door encroachment upon public morals?"; can only be inquired into and discussed intelligently when such scenes can be brought into the same clear focus for all nine judges in the conversation. Further the implications of any given scene, with the blending of observations through sight and sound, often cannot be fully understood without examination and re-examination. To overcome that difficulty and to assist the individual members of this Court in the analysis of "Carnal Knowledge" which this Court must undertake, Amicus has attached hereto as Appendix A and B, a "Continuity" and a Time-Motion Study of the film, "Carnal Knowledge".

The continuity of "Carnal Knowledge" appearing herein at Appendix A (pages A-1 thru A-84), contains an accurate reproduction of the sound portions of the film, identifying the actors, their role and what they say as the film progresses. In addition, selected visual screened depictions are captured

by a still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance (or exaggeration) for the benefit of the Justices considering this appeal.

The Time-Motion Study of "Carnal Knowledge" appearing herein at Appendix B (pages B-1 thru B-27) is a chronological series of still photographs of the motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Also attached to this Brief is a casette tape containing the sound track for "Carnal Knowledge" with 756 superimposed signals indicating at what point in the sound track the particular photograph used in the Continuity and Time-Motion Study taken. Reference is made hereinafter to such Continuity and to such Time-Motion Study in support of the proposition that "Carnal Knowledge" does in fact treat sex in a fundamentally offensive manner.

In view of the nature of the audience of 17 year olds and older to whom "Carnal Knowledge" was aimed, Amicus would ask the individual members of this Court whether the simulated oral sodomy and lewd fondling scenes, etc., in "Carnal Knowledge" (see, for example, pages A81 thru A84 of the Continuity and B24 - B27 of the Time-Motion Study) were not more destructive than the sodomy scene described by defense witness Lightsey as appearing in the film "Such Good Friends". It is estimated by the National Association of Theater Owners (NATO) in their Brief Amicus Curiae (at footnote 4) that approximately 17,500,000 people paid approximately $35,000,000 in box office receipts to see "Carnal Knowledge". Though NATO would urge this as a defense, Amicus views that statistic as an indictment against the film, and the damage it has done and will do to the system of values and language of sex in our society.

In the collection of writings in "The Case Against

Pornography",[35] Ian Robinson makes the following statement against pornography (which applies in full to "Carnal Knowledge") at page 172:

> Our most obvious remark - so obvious that were it not for the assumptions of the contemporary 'debate' about pornography we would not trouble to make it - is therefore that any judgment of pornography involves questions about values. For even if pornography could be caught causing events, the question whether the events are instances of depravity or corruption could not be answered by the events themselves *qua* events. What is and what is not depravity depends not on events but on a scheme of values. If we say that Brady and Hindley were depraved and corrupted, we are judging them within a set of values which makes us believe that it is wicked to take pleasure in murder. Within that set of values, but only within it, the murders are seen as proofs of depravity. What to a physiologist may be different instances of the same action may be adultery, fornication or married bliss, depending on circumstances. What counts as depraving a human being is not to be determined by measurements of any sort. *It is the central questions of value that defenders of pornography, and liberalizing sex-talk in general, tend to ignore - which is itself, we shall argue, a tendency to deprave and corrupt.* (Our emphasis).

and at page 174:

> Sex has its unpredictable significance within what we will call 'a language of sex' in the individual's life - meaning by that phrase everything that can make sex part of humanity: images, dreams, memories, ideals, moralities, pictures, words. The last item ranges from love poetry to the tones of tenderness, the names of the sex organs, and pornography.
>
> The individual recreates the value of sex from the language of sex of those around him. (Could there be a

---

[35] The Case Against Pornography, Edited by David Holbrook, published by Tom Stacey, Ltd. 28-29 Maiden Lane, London.

society which contained just one married couple?) It is also true that language in the narrower sense of verbal expression is very important part of the circumstances of sex: the language of sex spoken and written in a society expresses the commonly understood significance of sex there, and a change in the language of sex is a change in the experience and evaluation of sex in the lives of the speakers of the language.

If pornography is a threat it is not because any man reading Mr. David Storey's novel *Radcliffe* is likely to develop a taste for being orally homosexually assaulted - though he might - and not because any woman reading Mr. Adrian Mitchell's latest, *The Bodyguard*, is likely to make for the nearest bar, there to enjoy fellatio - though that might happen too - but because pornography works on, affects and changes the common language of sex, and because it tends to deprave and corrupt that language.

and at page 175:

Pornography doesn't *cause* depravity and corruption, it is depravity and corruption. In this way it is possible to see a tendency to corrupt and deprave connected with pornography not in a cause-and-effect way but as an internal relationship: the corruption occurs in whatever reading allows pornography to be itself.

and at page 176:

If this is so, the question what is and what is not pornography falls within literary criticism, and so is unlikely to be dealt with well in courts of law.

Many an honest legal penny has been earned by counsel demonstrating that a writer's intention was innocent though his work may look guilty. But having transferred the discussion to literary criticism we can say that a writer's intention is to be dealt with here in the same way as elsewhere in literary criticism. The question is again resolved into consideration of the work in our inner possession: the real intention is the one that gets expressed, and intention is the same as expression. *Unless an author is incompetent his work*

intends to say what it does say.

If, however, the definition of pornography must be left to a court of law, the important dialogues ought at least to go differently. At present the ordinary thing is for the defense to discomfit presecution witnesses by asking them whether they personally have been depraved or corrupted by the work in question. Usually a witness will refuse to admit he has been, and the case against the book is weakened. Or perhaps he will say very bravely (as Sir Basil Blackwell did) that he has been corrupted - but then the following question *how?* will still be unanswerable except in embarrassingly personal terms. Instead the dialogue should go:

Question: Has it corrupted you?

Answer: Yes.

Question: How?

Answer: Look how it works here and here. This is isn't it?

- the discussion is now to be continued of the book, not of the witness's possibly abnormal psychology: the discussion is resolved into literary criticism? and if *The Times* want to find 'disintegration' the place to look is in the pornography itself. (Similarly the general answer to the questions: 'Have you personally benefited from reading Dickens? How?' should take the form of Captain Brown's exclamation in *Cranford*, 'Don't you think it is famously good?) But this will hardly do in court, where neither criticism nor the language of sex are much at home. The questions we have to ask, though not quite the ones that are forbidden, are too much like them, 'Is the thing in front of us shocking, outrageous or offensive to decent feeling?' From the point of view of the lawyer the trouble is that really 'the thing' is not in front of us, it is within us.

Because we have to do here with a language of sex, and with corruption as part of understanding, all readers are corrupted to the degree of their reading, and non-readers are corrupted to the degree of the impact of pornography on the common language. This last is why

the matter affects everybody: *the language of sex is everyone's concern, celibates and all, because we all have to make sense of sex within it.*

and at page 178:

We can, however, on the strength of the foregoing discussion, make some general distinctions between what is and what is not pornographic.

A work whose sexual content is left deliberately uncontrolled by the artist is pornographic. Nude love-making on stage or screen is always necessarily pornographic because the expression - the understanding of the audience - cannot be controlled as part of the work. Nude love-making immediately breaks the art of the play and instead thrusts real voyeurism upon the audience. It is possible to imagine times and places where an audience would not be unartistically engaged by stage sex, but that time and place cannot be Christendom at the end of its second millennium. *We are used to modesty and privacy, and in our language of sex the response to nude love-making is not to the play but to the real (or not) actions.* We want to know how far they're really going and what they feel like doing it. And are they really doing it? (Our emphasis.)

In the above framework of values, if the State of Georgia, in crystal-clear legislative language, and crystal-clear judicial language, holds that a motion picture exhibitor may not exhibit "an act of sexual intercourse" and "a lewd fondling of the body of another person. . ." then by sovereign fiat, scene 37 and scene 6, described below, become hard-core pornography:

(a) Scene 37 (See Continuity at A-78 thru A-84 and Time-Motion Study at B-24 thru B-27) which presented a five minute scene in which a prostitute Louise performed fellatio (simulated) on Jonathan in his apartment). Of those five minutes, 2-1/2 minutes are devoted to the depiction of the felonious act of sodomy itself. (See A-80 thru A-84 and B-24 thru B-27 at Photographs 701-756.)

(b) Scene 6 (See Continuity at A-14 thru A-15 and Time-Motion Study at B-4 thru B-5) which presented a 23 second scene in which Sandy is shown placing his hand on Susan's breast, after telling Jonathan that he was going to "feel her up" and a one minute scene in which Susan herself takes Sandy's hand and places it on her breast. (See A-14 thru A-15 and B-4 thru B-5 at Photographs 67-69 and 77-96).

The following scenes also come under a like proscription:

Scene 7 (See continuity at A-15 thru A-17 and Time-Motion Study at B-4 thru B-5) wherein Sandy demonstrates to Jonathan how Susan "unzipped his fly" and "did it" (See masterbation motion at A-17 photo 109).

Scene 13 (See continuity at A-24 thru A-25 and Time-Motion Study at B-6 thru B-7) wherein Jonathan and Susan have sexual intercourse.

Scene 15 (See continuity at A-26 thru A-28 and Time-Motion Study at B-8 thru B-9) wherein Sandy and Susan engaged in sexual intercourse in Sandy's dorm room after Sandy produces a contraceptive.

Scene 25 (See continuity at A-45 thru A-47 and Time-Motion Study at B-12 thru B-13) wherein Jonathan and Bobbi engage in sexual intercourse in Jonathan's apartment.

Scene 26 (See continuity at A-47 thru A-48 and Time-Motion Study at B-14 thru B-15) wherein Bobbi joins Jonathan in shower.

See the Georgia Supreme Court's ruling on similar scenes in "I Am Curious (Yellow)" in *Evans Theater Corp. v. Slaton*, 227 Ga 377, 180 SE.2, 712, 715 (Mar. 4, 1971), cert. denied 404 US 950, 30 L.Ed.2 267, 92 S.Ct. 281 (Nov. 9, 1971). Any question as to whether, under state law, the proscription as to an "act of sexual intercourse" included simulated sexual activity was fully answered in *Slaton v. Paris Adult Theatre I*, 185 S. E. 2d 768 at 770, (November 5, 1971):

> "Appellee also contends, and the trial judge so found that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True,

> the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theatre case that, "I Am Curious (Yellow)," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment."

Amicus submits that it is not a proper exercise of this Court's federal appellate jurisdiction, and it is no business of this Court to tell the Georgia State Government that it may not so act in relation to the above described and other scenes depicting explicit sexual conduct in "Carnal Knowledge." The values which are at stake here are "public values", not those to which Justice Marshall addressed himself in *Stanley v. Georgia*, 394 US 557, 22 L.Ed.2d. 542, 550, 89 S.Ct. 1243 (Apr. 7, 1969) when this Court held that the State of Georgia did not have the right "to control the moral content of a person's thoughts."

2. Jenkins Conviction Should Be Affirmed On The Grounds That He Has Reasonably Been Found To Be Guilty Of Conduct Which Treats Sex In A Fundamentally Offensive Manner.

Corollary to the question regarding the "obscenity vel non" of "Carnal Knowledge" is the further question which should be asked in relation to Justice Harlan's test for appellate review, stated in *Jacobellis v. Ohio*, supra, regarding Jenkins "conduct" as operator of the Broad Avenue Cinema: "Was his conduct such that it can be said the state acted reasonably in finding Jenkins guilty of operating a business which treated sex in a fundamentally offensive manner?"

The prosecutor's case in chief consisted solely of a showing of the film "Carnal Knowledge" to the jury (see page 24, (supra). As proof of knowledge, the prosecutor relied upon the nature of the subject matter and the fact

that Jenkins, as the manager and operator of the theater, knew the contents of the film. In his defense, Jenkins offered the testimony of Ed Lightsey who testified that another film entitled "Such Good Friends" was presently playing at a theater in Albany and had a scene wherein was shown one of the men "was talking over the telephone, a woman, one of the essential characters in the movie, performed an act of sodomy on him" and that after this was over, he said "Oh, God damn, I'm sorry I got it on your nose." Jenkins also gave an unsworn statement (see page 28, supra) in which he stated "as far as the motion picture 'Carnal Knowledge' is concerned, I have no knowledge of this motion picture being obscene or breaking any state or local law because of its content. . ." In rebuttal the presecutor offered the testimony of investigator Lynn Stout (see page 29, supra) who introduced nine photographs of pictures being shown on the screen of the Broad Avenue Cinema on July 14 (Ravager), July 12 (Sweet Bird of Aquarius) July 4 (Midnight Plowboy) and July 22 (Southern Comfort) and (Tobacco Roady) showing explicit sexual conduct. Lynn Stout also testified that there had been an arrest at the Martin Theater in October 1970 for a previous showing of Carnal Knowledge and that an agreement had been reached with the Martin Theater that the film would not be shown in Albany, Georgia unless there was a judicial determination. Jenkins stipulated that he had knowledge of that agreement.

Amicus submits that the state of the record noted above demonstrates that the State of Georgia was justified in affirming the judgment of conviction in that Jenkins has reasonably been found to be guilty of conduct which treats sex in a fundamentally offensive manner.

CONCLUSION

For all of the foregoing reasons, the judgment of the Georgia Supreme Court should be affirmed. The time has come for this Court to commit itself to the common sense view espoused by Justice Harlan in *Roth-Alberts*, supra, and other cases, and to return to State Governments the power to supervise public morality. Surely this nation's experience

over the past 17 years, as documented in *Miller v. California* et al, supra, has demonstrated that this Court must abandon its former practices in the administration of appeals of obscenity cases, which amounted to nothing less than arbitrary and dictatorial censorship at the hands of the federal judiciary.[36] This latter result was never intended by the founding fathers.

Respectfully submitted,

Charles H. Keating, Jr.
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day of March, 1974, copies of the within Amicus Curiae Brief were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Carter Goode
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Atlanta, Georgia 30303

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1500 Candler Bldg.
Atlanta, Georgia 30303

Attorney for Amicus Curiae

[36] Judge Learned Hand viewed the court's usurpation of this inherent right of the people as an evil. See Hand, Bill of Rights, Harvard University Press (1958) at page 73, 74:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them which I assuredly do not. . ."

Hand gave insight to his decisions, which restricted the role played by the courts:

> "It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. On such issues experience has over and over again shown the difficulty of securing unanimity. This is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure they will not be caught."

APPENDIX A

Continuity *(Scenario) of motion picture film "Carnal Knowledge",..... 3-84

*The "Continuity" contains an accurate reproduction of the sound portion of the film, identifying the actors, their roles and what they say as the film progresses. In addition, selected *visual* screen depictions are captured by a still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance (or exaggeration) for the benefit of the Justices considering this appeal.

The inability of the mind to recall accurately and chronologically the rapidly moving visual and audio "facts" presented in a motion picture film point to the need for recording accurately, as much of the factual material as is possible, for use in conjunction with the principle of "past recollection recorded." As that concept has utility for purpose of oral argument. With the latter accessory, an intelligent analysis and examination of the film based on its content is possible.

CARNAL KNOWLEDGE

(Playing Time - 97 Min.)

Avco Embassy Release of a Mike Nichols Production. Directed by Mike Nichols. Executive Producer, Joseph E. Levine. Associate Producer, Clive Reed.

CAST: Jonathan - College Chum of
Sandy - Later a Doctor.
Susan - Their girl friend, later Sandy's wife.
Bobbi - Jonathan's mistress, former commercial actress.
Cindy - Sandy's mistress.
Jennifer - Sandy's hippie girl friend.
Louise - A prostitute.

SCENE I (:03)

CREDITS APPEAR AS VOICES OF JONATHAN AND SANDY ARE HEARD DISCUSSING GIRLS AND SEX. BIG BAND MUSIC OF THE '40'S IS HEARD IN BACKGROUND ("MOONLIGHT SERENADE")

Jonathan: "If you had a choice -- "

Sandy: "Yeah?"/1

Jonathan: "Would you rather love a girl or have her love you?"

Sandy: "I want it mutual."/2

Jonathan: "If you couldn't have it mutual."

Sandy: "You mean, would I rather be the one who loves,/3 or is loved?"

Jonathan: "Yes."

Sandy: "It's not that easy a question./4 I think I'd rather be in love."

Jonathan: "Me, too,/5 I wouldn't want to get hurt, though."

Sandy: "You're in love with Gloria."

Jonathan: "I was startin'/6 to be in love with her. But she let me feel her up on the first date. Turned me right off." (:44)/7

Sandy: "You kept going?"

Jonathan: "Oh, she let me feel her up."

(Laughs. They both laugh.)/8

Sandy: "Yeah, what about Gwen?"

Jonathan: "Her I can talk to."

Sandy: "I've never been able to talk to /9 any girl."

Jonathan: "I was really getting crazy about her. She's stuck-up. Wouldn't let me lay a hand on her./10 So I went back to Gloria."

Sandy: (Chuckles) "Well -- you want perfection."

Jonathan: "What do you want, wise guy?"/11

Sandy: "She just has to be nice." That's all.

Jonathan: "So -- you wouldn't want her beautiful?"

Sandy: "She doesn't have/12 to be beautiful. I would like her built, though."

Jonathan: "I want mine sexy-lookin'."

Sandy: "I wouldn't [13] want her to look like a tramp."

Jonathan: "Sexy doesn't mean she has to look like a tramp. There's a middle ground, you know."

Sandy: "I would want that, [14] yeah."

Jonathan: "Tall -- very tall. That would scare me. (Laughs.) [15] She should be very understanding -- start the same santence together."

Sandy: "Yeah, I'd like that."

Jonathan: "Big [16] tits." (Laughs.)

Sandy: "Yeah, but still a virgin."

Jonathan: "I don't care about that."

Sandy: "C'mon." [17]

Jonathan: "I wouldn't mind (2:10) if she was a little ahead of me. Those big tits. Hundreds of different ways." [18]

Sandy: "I want more of a companion. The other stuff I can get on the outside." [19]

Jonathan: "First time I do it, I want it beautiful. Not waste it on some beast." [20]

Sandy: "I feel the same way about getting laid as I feel about going to college. We're being pressured [21] into it."

SCENE II (2:50)

JONATHAN AND SANDY MEET SUSAN AT COLLEGE MIXER

(Music up. "I'm Getting Sentimental Over You."/22)

Susan is leaning against window seat. They are watching her.) /23 thru 29

Jonathan: "You like that?"/30

Sandy: "Yeah."

Jonathan: "I give her to you."

Sandy: "What's wrong with her?"

Jonathan: "I'm a generous guy, and yeah, I'm grateful."

Sandy: "How do I break the news to her?"

Jonathan: "You go over there --"

Sandy: "Yeah --"

Jonathan: "There's a way to talk to girls, you know. Tell 'em a joke."

Sandy: "What joke?"

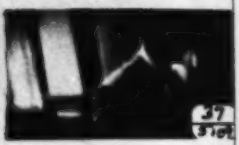
Jonathan: "Tell her about your unhappy childhood."/31

Sandy: "That's not bad."

Jonathan: "But don't make it like an act. No, go ahead -- (4:14) go ahead, schmuck. If you don't, I will."

Sandy: "You! You can't even stand / 32 up."

(Music up. Sandy approaches Susan, loses nerve and retreats.) / 33 thru 37



Jonathan: "Fucked up / 38 it's my turn (5:18) now."

Sandy: "What d'ya mean, it's your turn. She's mine. You gave her up to me."

Jonathan: "You struck out."

Sandy: "I get two more times at bat." / 39, 40, 41

(Music up. Sandy goes over, stands beside Susan, looks out window.)

Susan: "This is the first time I've ever been to a college mixer."

Sandy: "Me too, I hate them."

Susan: "I hate them too." (6:03)

Sandy: "It's such a phony way of meeting people."

Susan: "Everybody puts on an act."

Sandy: "So even if you meet somebody,/ 42 you don't know who you're meeting."

Susan: "'Cause you're meeting the act."

Sandy: "That's right. Not the person."

Susan: "I'm not sure I agree."

Sandy: "With what?"

Susan: "With what you said."

Sandy: "No I don't either."

Susan: "You don't agree with what you said?"

Sandy: "How do you feel about it?"

Susan: "I think people only like to think they're putting on an act -- but it's not an act -- it's really them. If they think it's an act, they feel better because they think they can always change it."

Sandy: "You mean they're kidding themselves because it's not really an act."

Susan: "Yes, it is an act -- but they're the act. The act is them."

Sandy: "But if it's them, then how can it be an act?"

Susan: "'Cause they're an act."

Sandy: "But they're also real."

Susan: "No, Sandy."

Sandy: "You mean I'm not real?"

Susan: "No, Sandy."

Sandy: "I'm an act --."/ 43

Susan: "Don't you behave differently with different people?"

Sandy: "No!"

Susan: "With your family?"

Sandy: "Well, sure -- with my family -- "

Susan: "And with your friends you're another way."

Sandy: "Sure --"

Susan: "And with your teachers, you're still another way -- so which one is you?"

Sandy: "Well, when you put it that way. You ought to be a lawyer."

Susan: "I'm gonna be a lawyer."

Sandy: ". . . want to be a lawyer?"

(Music)

Sandy: "You're from Smith, right?" /44 (7:32)

Susan: "Uh, huh."

Sandy: "Do you like it?"

Susan: "Yeah, I like it all right. Do you like Amherst?"

Sandy: "Sure, why shouldn't I? My parents work very hard to send me. I'd better like it. Do you have a name or something?"

Susan: "Susan."

Sandy: "I'm Sandy."

SCENE III (7:57)

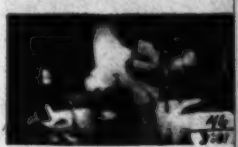
DORM ROOM AT NIGHT, SANDY AND JONATHAN DISCUSS SUSAN

Jonathan: "I think /45 you can make out with her."

Sandy: "You think so?"/46

Jonathan: "She's stuff."

Sandy: "You think so?"



Jonathan: (8:05) "I wouldn't kick her out of bed."

Sandy: "Then -- I shouldn't try somebody else then?"

Jonathan: "Who?" (They laugh.)/47

Sandy: "Well, she was the best-looking girl at the whole mixer. I'll say that for her. Wasn't she?"

Jonathan: "Her tits were too small."

Sandy: "Yeah, /48 I was thinkin' that. The hell with 'em!"

Jonathan: "But her legs were great."

Sandy: "You think so? Standing so close, I really couldn't tell about her legs."

Jonathan: "I wouldn't kick her out of bed."/49

Sandy: "She's got some funny ideas."

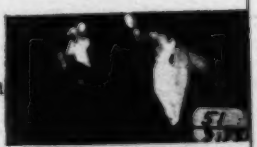
Jonathan: "I wouldn't kick /50 her out of bed."

SCENE IV (8:49)

SANDY WALKS SUSAN HOME AFTER A DATE. THEY KISS.

Susan: "Don't push me,/51 Sandy."

Sandy: "What's the matter? I like you very much, Susan./52 It's our third date."



Susan: "I like you too." (9:02)

Sandy: "Well, you let me kiss you last week."

Susan: "And this week --"

Sandy: "If I could kiss you once last week, I should be able to kiss you at least twice tonight."

Susan: "You're the only boy I know that I can talk/ 53 to."

Sandy: "I can't see you being quiet for any guy."

Susan: "No, not quiet, exactly -- but if you know somebody's not going to approve of what you are --"

Sandy: "Whatever that is --"

Susan: "Whatever that is. Well, you just don't tell him. I mean, if I like a boy, and I want him to keep liking me, and I'm brighter than he is -- I have to not show it, or I'll lose him -- so it's hard."

Sandy: "Well, I wouldn't want anyone overly bright."

Susan: "Yeah, but you wouldn't feel threatened."

Sandy: "I might be bothered/ 54 a little."

Susan: "I don't think you would nearly as much as some people. Now, for instance, some day I want to write novels. Not now, but, you know, later on, -- when I have something to say. Now that doesn't threaten you, does it?"

Sandy: "No./ 55 Maybe a little."/ 56 (10:04)

Susan: "Don't press so hard./ 57 See, it's better when it's gentle. See? / 58 What are you grinning at?"

(They are kissing.)

SCENE V (10:28)

JONATHAN URGES SANDY TO "FEEL HER UP" AND "GO ALL THE WAY" WITH SUSAN.

(Jonathan in shower is talking to Sandy who is shaving.)

Jonathan: "You 59 feel her up yet?"

Sandy: "C'mon. I like this girl. 60 I don't want (--inaudible.)

Jonathan: "Was I right about kissing her?"

Sandy: "Listen -- we had a big fight over it." (He is shaving.)

Jonathan: "And you won!"

Sandy: "Well, I don't know if I won or not."

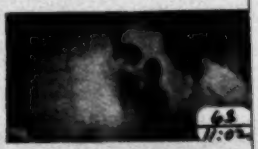
Jonathan: "Why do you let yourself be pushed around?"

Sandy: "You're the one who's pushing me around! 61 Well, I guess I won -- Sure I won. She kissed me five times."

Jonathan: "And that's when you should have put your hand on her tits." 62

Sandy: "C'mon. When this girl's nice enough to kiss me, I should do that to her?"

Jonathan: "You act as if she's doin' you a favor." 63

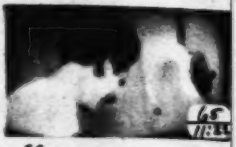


Sandy: "Well, it is sort of a favor, isn't it? I mean, when a girl lets you kiss her -- you know, 64 go on from there. Feel her up -- you know, the rest

of it -- (Jonathan is giggling) -- Go all (11:07) the way -- and the rest of it. I mean, isn't it a favor?"

(Jonathan is still giggling -- almost laughing.)

Sandy: "What's in it for her? I mean, she's not getting paid or anything."

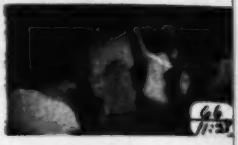


(Jonathan is laughing.)

Sandy: "Fuck you."/65

(Jonathan laughs.)

Sandy: "Okay, okay -- I'll feel her up."/66



SCENE VI (11:29)

SANDY PLACES HIS HAND ON SUSAN'S BREAST. SUSAN PLACES HER HAND IN THE AREA OF SANDY'S GENITAL ORGAN.

Susan: /67 "Sandy, please take your hand off my breast."

Sandy: "Why?"

Susan: "'Cause I want you to./68 How can it be any fun for you, if you know I don't want it?"

Sandy: "I didn't say it was fun."

Susan: "Then why is your hand where it is?"

Sandy: "Because the way we're going, by this time I should be feeling you up."/69

Susan: "Hmph! I don't feel that way about you, Sandy."/70

Sandy: "I feel that way about you."/71

(Pause) (12:01)

Susan: "You want me to feel something for you, too, don't you?"

Sandy: "I thought you liked me."

Susan: "I do like you. But I like you for other reasons.

Sandy: "So--"

Susan: "So--? If we went any further, there wouldn't be those reasons any more."

Sandy: "Well, we might/72 have something else, though."

Susan: "What?"

Sandy: "Something else. (pause) You're the first girl I've ever done that to, Susan." /73(pause)/74

Susan: "I didn't know that."

Sandy: "It doesn't show?"

Susan: "No."

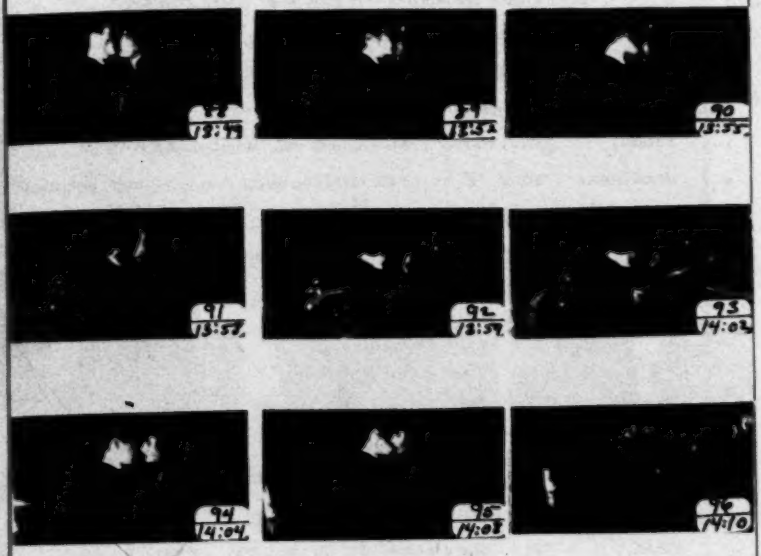
(Pause.) (13:01)

Sandy: "Well, it's something we both have to go through, I guess."

(They start kissing -- she puts his hand on her breast.)

Sandy: "Susan, are you a virgin?" / 81 thru 87 (Pause.)

Sandy (Cont'd): Well, 88 what do I do with my other hand? 89 thru 93 (Pause.) (14:01) What're you going to do with your hands?" 94-95-96



SCENE VII (14:12)

SANDY DEMONSTRATES TO JONATHAN HOW SUSAN "UNZIPPED HIS FLY" AND "DID IT."

Jonathan: (14:12) "And then what?" 97

Sandy: "She told me to take my hand off (14:14) her breast." 98

Jonathan: "What'cha do?"

Sandy: "I said I didn't want to."

Jonathan: "Then what?"

Sandy: "She said how could it be fun for me when she didn't like it." 99

Jonathan: "Jesus."

Sandy: "I thought that she liked it."

Jonathan: "Yeah --"

Sandy: "She said, 'I like you for other reasons' --"

Jonathan: "Other reasons:"

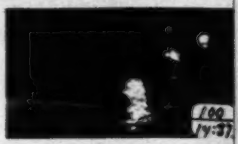
Sandy: "So I told her how I really needed this."

Jonathan: "What did you tell her?"

Sandy: "You know, that it was my first time --"

Jonathan: "Your first time what? What did you say exactly?"

Sandy: "I don't remember exactly./100 That she was the first girl I ever tried to feel up."



Jonathan: "You told her <u>that</u>?"

Sandy: "Is it a mistake?"

Jonathan: "I wouldn't."

Sandy: "Then she got /101 nicer to me"

Jonathan: "What do you mean? Nicer?"

Sandy: "She put my hand on her breast."/102

Jonathan: "You mean you put it on, she left it there."

Sandy: "No. <u>She</u> picked it up and put it on."

Jonathan: "She -- she took your hand -- like this?"/103

Sandy: "That's right. I didn't know what to think."

Jonathan: "You didn't, huh --?"

Sandy: "From just wanting to be friends, she's suddenly getting pretty aggressive."

Jonathan: "Yeah. Then what?"

Sandy: "I asked her if she was a virgin."

Jonathan: "You're kidding."

Sandy: "Was that a mistake too?/ 104 Anyhow, she is."

Jonathan: "She says. So now you got what? One hand or two hands on her tits?"

Sandy: "By this time, she's put the other hand on the other one."

Jonathan: "She put both hands on? Two hands?"

Sandy: "So I said - 'What are you going to do with your hands?'"/ 105

Jonathan: "You didn't say that!"

Sandy: "It just came out!!"

Jonathan: "Yeah? Then what?/ 106 (Giggles) Oh, let me see if I got this --"

Sandy: "She unzipped my fly."/ 107

Jonathan: (Laughing) "BULL SHIT ARTIST -- Then what?/ 108 THEN WHAT?"

Sandy: "Then she did it!"

Jonathan: "Did what?"

(Sandy makes masturbation motions,/ 109 Loud laughter from both.)

Jonathan: "Bull shit artist! She really did that?/ 110 She did that?"/ 111, 112, 113 (Giggles, laughter from both, as they go indoors.)

SCENE VIII (15:56)

JONATHAN PHONES SUSAN FOR A DATE

Jonathan: "Hello, is/114 this Susan? Well, you don't know me, I'm a friend of Sandy's -- his roommate. Yeah, Jonathan. (16:04) He told you about me? Yeah. So, uh, I'm just here at Smith for tonight. Practically on campus. I was just taking a drive, you know, and /115 I found myself practically on campus --"

SCENE IX (16:20)

JONATHAN DATES SUSAN

(Driving)/116

Jonathan: "How do you like /117 Smith?"

Susan: "What's your major?"

Jonathan: "Where'd /118 you go to high school?"

Susan: "What do you do in the summer?"/119

Jonathan: "Do you always answer a question with a question?"

Susan: "Do you always date your best friend's girl friends?"

Jonathan: "Sandy told me you were beautiful."

Susan: "He told me you were sexy. I guess he's /120 just a poor judge."

Jonathan: "I guess he meant you had personality."

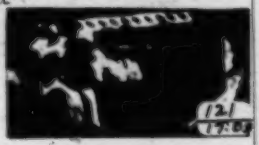
Susan: "Good grief."

Jonathan: "You have a special quality. I like girls who are special."

Susan: "Oh, hardly that special."

(Sitting in Coffee Shop)

Jonathan: "Some people / 121 you can tell about right away. Most girls I talk to it's like we're spies from foreign countries and we're speaking in code. Everything means something else. Like I say -- would you like to take a walk? -- That means something else. And she says -- I can't, I've got a French test tomorrow -- and it means something else."



Susan: "And you say, I'll come over and help you study and it means something else --"

Jonathan: "You're very sharp. I like that."

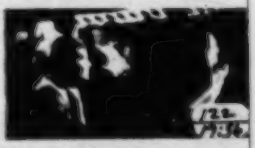
Susan: "And that means something else, too."

Jonathan: "You're TOO sharp."

Susan: "Does that bother you?"

Jonathan: "It interests me."

Susan: "Is that more code?" / 122



Jonathan: "We'd be good together."

Susan: I'm dating your best friend.

Jonathan: He won't mind."

Susan: "How do you know?"

Jonathan: "I won't tell him." (Giggles)

Susan: "What if I mind?"

Jonathan: "You want to go out Friday?" / 123

Susan: "I'm seeing Sandy."

Jonathan: "Saturday --"

Susan: "I have a date."/124

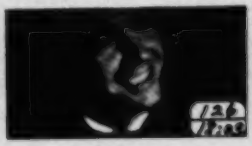
Jonathan: "Sunday --"

Susan: "I'm seeing /125 my folks."

Jonathan: "Where /126 do they live?"

Susan: "New York."

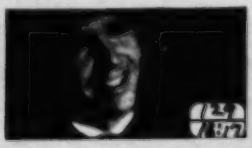
Jonathan: "Sunday night?"/127 (18:05)



Susan: "I'll be too tired."

Jonathan: "I'll help/128 you get over your folks. How about it, Susan?/129 What're you so afraid of?"/130

Susan: "Not you, Hmmm."



SCENE X (18:)

DORM ROOM AT NIGHT - SANDY DISCUSSES SUSAN WITH JONATHAN

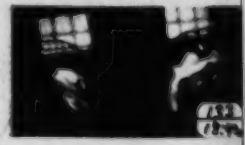
Sandy: /131 "I think I'm in love."/132

Jonathan: "Oh?"

Sandy: "I think I'm in love."

Jonathan: "Bull shit artist."

Sandy: "I really /133 think so."



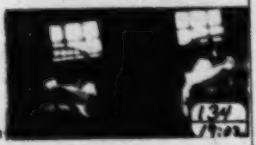
Jonathan: "Did you get in yet?"

Sandy: "What's that got to do with it?"

Jonathan: "How do you know if you don't know how you are in bed together?"

Sandy: "But that's not everything!"

Jonathan: "It's a lot."



Sandy: "She tells me thoughts I didn't even kow I had, until she 134 tells 'em to me. It's unbelievable. I can talk to her."

Jonathan: "You can talk to me, too. Are you in love with me?"

Sandy: "I can say things to her (19:05) I wouldn't dare say 135 to you."

Jonathan: "What for instance?"

Sandy: "Things you'd laugh at."

Jonathan: (Laughing) "Humph! I'm laughin' now." 136 (Laughs)

Sandy: "She thinks I'm sensitive."

Jonathan: "Sensitive? (Laughs) Sensitive! Oooh! Boy! (Laughs) What you talk to her about -- flowers?"

Sandy: "Books."

Jonathan: "Books? You phoney. I read more books than you do." 137

Sandy: "Yeah, well I'm gonna start, I'm reading 'The Fountainhead.'"

Jonathan: "'The Fountainhead'? What's that?"

Sandy: "It's her favorite book. You ever hear of 'Jean Christophe'?"

Jonathan: "What's that?"

Sandy: "It's a classic, you moron. I'm gonna read it right after 'The Fountainhead'."

Jonathan: "Yeah? Ever read 'Guadalcanal Diary' by Richard Tregaskis?"

Sandy: "No."

Jonathan: "That was a best seller and I read it. Ever read 'Gentleman's Agreement' by Laura Z. (20:05) Hobson? Ever read 138 'A Bell for Adano' by John Hersey?"

Sandy: "I'm gonna read everything from now on."

Jonathan: "I read more than you do -- so who's the one who's 139 sensitive? You or me? C'mon who's sensitive?

SCENE XI (20:21)

JONATHAN AND SUSAN ON DATE

Jonathan: "I've had a very messed up childhood."

Susan: "What does you father do?"

Jonathan: "Fails. It's not funny."

Susan: "I'm sorry. Were you very poor?" 140

Jonathan: "My father couldn't hold onto a job. He kept giving me advice. The more he failed, the more advice I got. He's a Communist, my father."

Susan: "We're Republicans. (Pause) Sometimes I think I'm a Communist, though."

Jonathan: "Me, too. We have so much -- and other people have, you know -- so little? After I get set up as a lawyer, what I'd really like to do is go into politics. Public service. What really gets me is I was too young to fight in the war, because -- what was that all

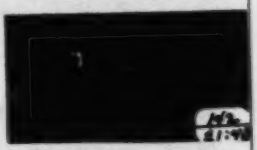
about except to prove -- everybody pitches in -- plain people have a chance. So -- even though I'm the first of my family to get an education, I don't ever want to forget where I came from."/141

Susan: "You're a lot more serious than I thought."

Jonathan: "I know."

SCENE XII (21:36)

DORM ROOM AT NIGHT -- JONATHAN TELLS SANDY OF "MYRTLE" (SUSAN)



Sandy: "Where'd you meet her?"/142

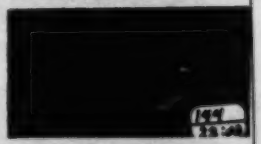
Jonathan: "I'm another person with her. You wouldn't recognize me -- the things that come out of my mouth!"

Sandy: "Boy, she really sounds like something! Is she built?"

Jonathan: "She's, uh, she's got a quality. She doesn't talk much -- but the things she says are so sharp."

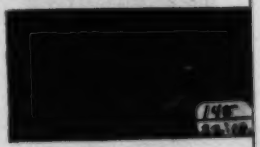
Sandy: "We should double/143-date sometime."

Jonathan: "Huh? I want to know/144 her a little better, you know. Before we double-date." (22:01)



Sandy: "Gee, isn't it great? A month ago, neither of us even knew a girl /145 -- what's her name?"

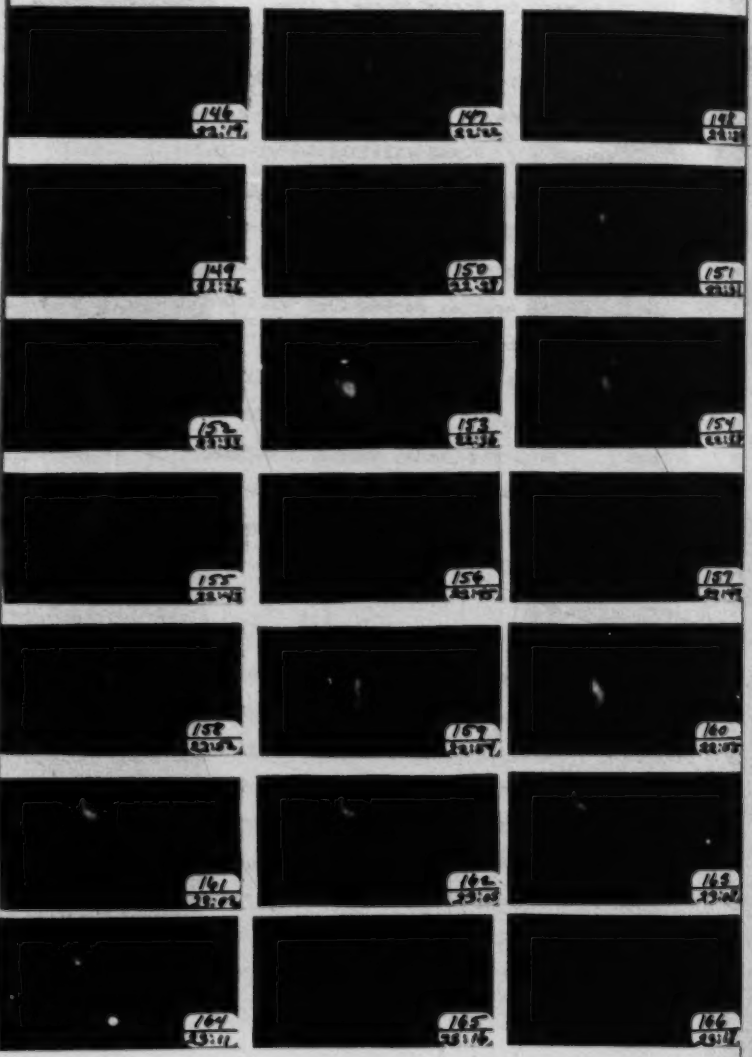
Jonathan: "Myrtle."

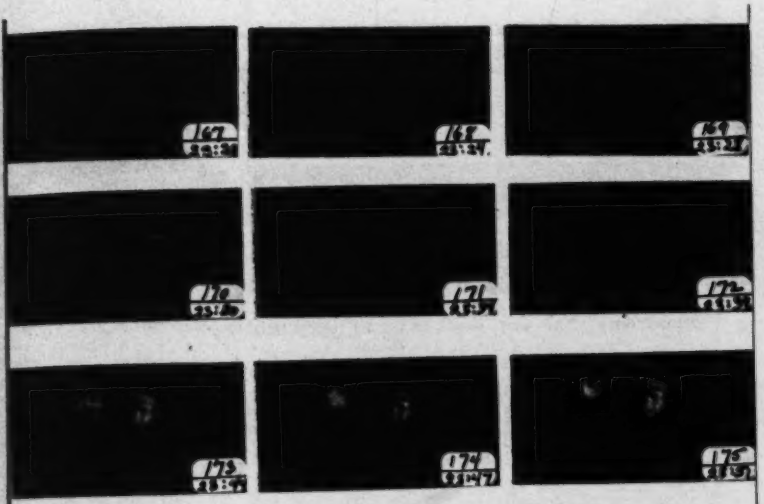


SCENE XIII (22:14)

JONATHAN AND SUSAN HAVE SEXUAL INTERCOURSE ON GRASS

(No dialogue. Heavy panting, breathing, throughout sexual activity.)





SCENE XIV (23:52)

JONATHAN TELLS SANDY HE "GOT LAID". SANDY DECIDES IT'S HIS TURN

(Sudden wild screaming, shouting.)

Sandy: (23:53) "BULL / SHIT ARTIST!" /

(Jonathan jumps into swimming pool. He is fully clothed.) /

Sandy: "You're not kiddin' me!"

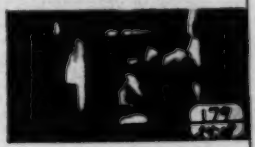
(Shouts and screams -- laughter)

Jonathan: "Look at me! You really thought --" (shouts, laughter)

(By the lockers)

Sandy: / "Next it's (24:06) my turn."

Jonathan: "I don't think she'll do it, Sandy."



Sandy: "She will -- I've just been takin' it /180 easy on her."

Jonathan: "Sandy, believe me, find somebody else."

Sandy: "Are you crazy? When I'm right on the verge? I see her tomorrow night."

Jonathan: "Uh, Sandy?"/181

Sandy: "Yeah --"

Jonathan: "Do you ever talk to her about me?"/182

Sandy: "Yeah, sure, sometimes."

Jonathan: "Do me a favor, /183 will ya?"

Sandy: "What?"

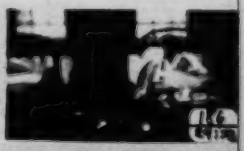
Jonathan: "Don't tell her I got laid."

SCENE XV (24:37)

SANDY'S DORM ROOM AT NIGHT. SANDY AND SUSAN ENGAGE IN SEXUAL INTERCOURSE AFTER SANDY PRODUCES A CONTRACEPTIVE.

Sandy: /184 "Please Susan. . "

Susan: "Sometimes I want /185 to do it and a second later I don't want to do it."



Sandy: "Let's do it."/186,187

-A-27-

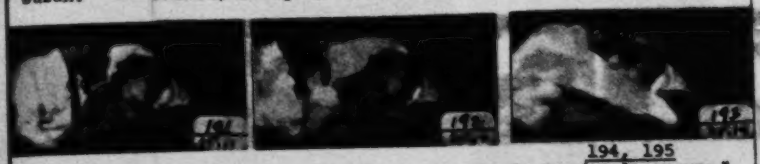
Susan: (Sighs) "I don't know why you put up with me./ 188 (Pause) I don't think I can do it."/ 189

Sandy: "That really hurts, Susan."

Susan: "Let me/ 190 --" (She reaches for him.)

Sandy: "Not any more."/ 191

Susan: "Please, Sandy."/ 192, 193

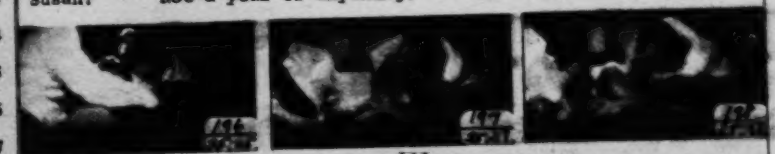


Sandy: "Oh, come on -- oh, Susan, let's do it./ 194, 195 I love you."

Susan: "Do you have anything?"/ 196, 197 (He takes out rubber contraceptive.) "How long have you had that?"/ 198

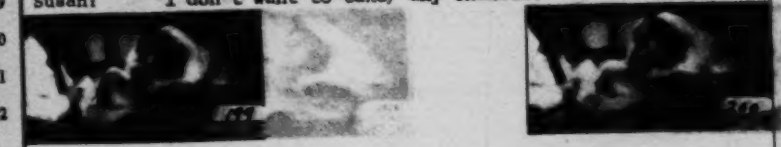
Sandy: "Not too long."

Susan: "Not a year or anything!"



Sandy: "I'm sure it's okay."/ 199

Susan: "I don't want to take/ 200 any chances."

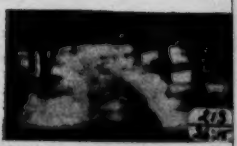


Sandy: "These things have to be okay./ (Pause) It's okay.

201 thru 206

(Pause) I'm positive it's okay."/ (Pause) (26:02)

207 thru 213



SCENE XVI (26:15)

SANDY TELLS JONATHAN HE "GOT LAID" BY SUSAN.

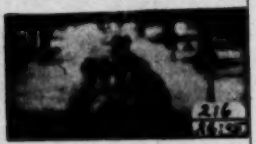
THEY ARGUE.

Jonathan: "I guess you're the first guy in history who ever got laid."

Sandy: "I'm the first guy in MY history who ever got laid."

Jonathan: "I like it, too, but you don't/214 hear me crowing about it. There's such a thing as good taste, you know."

Sandy: "What's the matter with you? Jesus. After you started scoring what did I get outta you?/215 We did it standing, sitting, in the car, under the car -- Myrtle, Myrtle, Myrtle!/216



You know, maybe you forget, but I knew Susan before you knew Myrtle -- and who scored first? You! That didn't make me feel very good, you know. In fact, it made me feel very jealous./217 But did I try to shut you up? Did I say I'm tired of hearing about it already? I didn't say it, 'cause I'm your friend, so I sat through it."

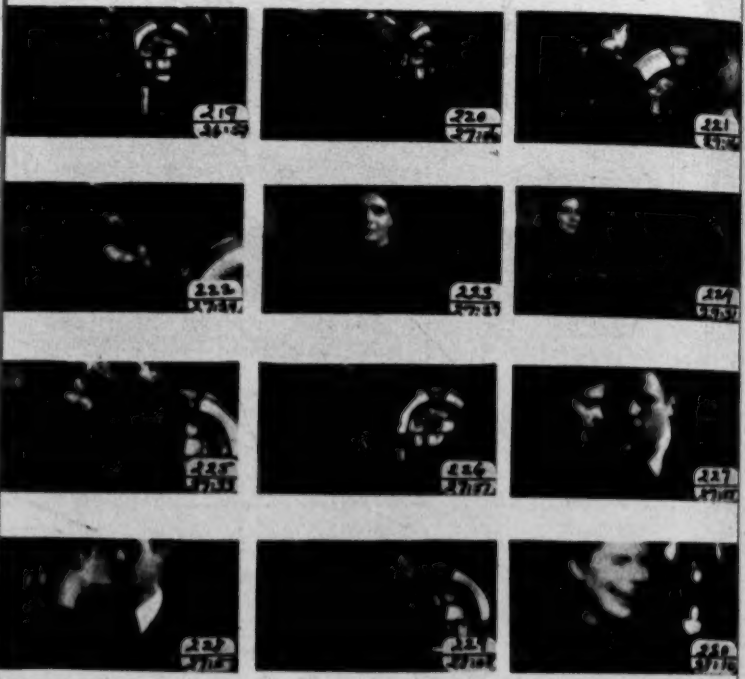
Jonathan: "Okay, okay -- Jesus, you made your point."

Sandy: "Sometimes /218 I think I'm a better friend to you than you are to me."

SCENE XVI (26:56)

DANCE - JONATHAN AND SANDY "DATE" SUSAN

(Music. "String of Pearls"./219 thru 230 Dancing. Conversation begins, much laughter, shrieking. Entire scene played with focus on Susan's face only --) (Wild laughter)



Jonathan: "Didn't you ever 231 / do that?"

Sandy: "Of course, I did. I knew what the word 'misled' meant -- I used to know -- when I first heard that I thought it was 'mizled' -- had been 'mixled'. (More wild laughing, shrieking) I kept wondering -- what did this word 232 / mean - 'mixled'."

Jonathan: "Has anybody ever heard of Round John Virgin?" (Much laughter.

Sandy: "What did you say -- Round John --?"

Jonathan: "Round John Virgin[233] . . ."

Sandy: "Is that in Falstaff?"

Susan: "Round John Virgin, Mother and Child:"[234] (Laughing)

Jonathan: "Yeah -- Round John Virgin Mother?"

Susan: (Singing) "Holy Infant, so tender and mild."[235]

Man: "All (29:01) right -- gun shee."

Man: "Gunshee? G-U-N-S-H-Y, gunshee!"

Man: "Gun-shy. I always thought[236] it was gunshee." (Laughter)

Sandy: "Susan, do you know the one about the bear -- you'll love this, Jon."

Jonathan: "Huh?"

Susan: "Oh, yeah -- the hymn we used to sing in church -- about the bear with the crossed eyes?"

Jonathan: "What are you giving me?"

Susan: "Whose name was Gladly?"

Jonathan: "Gladly?[237] The Bear?"

Susan: "Don't you know it? Gladly the "Cross I'd" bear?"

Sandy: "Gladly the cross-eyed bear -- get it?"

Jonathan: "Gladly the cross-eyed bear. Oh! Gladly the cross I'd bear!" (Laughter)

Jonathan: "All right. Pronounce this. C-H-O P-H-O U-S-E."

Susan: "Shoofus."

Sandy: "Showfus."

Jonathan: "Showfus![238] (Laughter). CHOPHOUSE!" (Wild shrieking).

SCENE XVIII (29:48)

JONATHAN AND SUSAN TALK

Jonathan: 239 "This has to stop."

Susan: "I don't know how to tell him."

Jonathan: "You don't have any trouble telling him a lot of other things."

Susan: "What does that mean?"

Jonathan: "The way you talk to him. I don't ever hear you talking to me that way."

Susan: "What way?"

Jonathan: "You know -- "

Susan: "He's very vulnerable -- I don't want to hurt him."

Jonathan: 240 "You're hurting me."

Susan: "He loves me."

Jonathan: "That's no reason to go to bed with him. (Pause) You would have just gone on, wouldn't you, if he hadn't told me?"

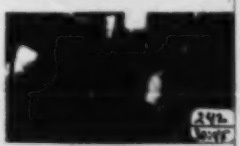
Susan: "I don't know."

Jonathan: "I would have never known a thing about it."

Susan: "I don't know -- maybe." 241

Jonathan: "Boy, you're really something."

Susan: "I don't feel like something. I feel like nothing." 242



Jonathan: "How much longer do you expect me to take this?"

Susan: "I'm trying to tell him."

Jonathan: "I see how you're trying."

Susan: "It's not my fault. I don't enjoy these fights."

Jonathan: "Listen, it's me you're supposed to be in love with.

(Pause) I'm gonna tell him."

Susan: "What?"

Jonathan: "I'm gonna tell him -- about you and me --"

Susan: "No, Jonathan!"

Jonathan: "Why don't you give me some of the understanding/ 243 that you give to him?"

Susan: "You're stronger."

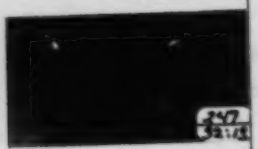
Jonathan: "You tell him everything else -- you can tell him about us."

Susan: "What do you mean I fell him everything? Who says so?"

Jonathan: "He tells me! He's my best friend./ 244 (Pause) Are you going to tell him?"

Susan: "He's so helpless." (Pause)/ 245

Jonathan: "Susan, I love you./ 246 Why can't you be more with me like you are with Sandy?" (Pause)/ 247



SCENE XIX (32:13)

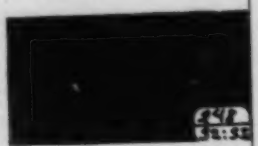
DORM ROOM AT NIGHT, SANDY TELLS JONATHAN OF HIS PROGRESS WITH SUSAN

Sandy: (32:13) (Wry laugh) "She says she's no good for me."

Jonathan: "Maybe she's trying to let you down easy."

(Sandy laughs)

Jonathan: "Go ahead and laugh. It adds up. (Laughter) Go ahead and laugh."/ 248



SCENE XX (32:35)

JONATHAN WARNS SUSAN TO TELL SANDY OF THEIR RELATIONSHIP

Jonathan: /249 "You know every mood of mine like you know/250 every mood of his --?"

Susan: "No."

Jonathan: "How come?"

Susan: "I don't know"

Jonathan: "You don't tell me thoughts I never knew I had."

Susan: "Did he say I do that?"

Jonathan: "Yes."

Susan: "When did you find out?"

Jonathan: "You do it all right,/251 so do it with me."

Susan: "I can't."

Jonathan: "You can do it with him, you can do it with me. Now -- tell me my thoughts."

Susan: "I can't!"

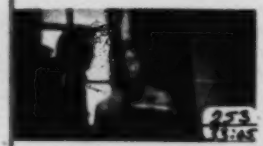
Jonathan: "Why can't you?"/252

Susan: (Whispers) "I can't with you."

Jonathan: "This has gone far enough."

Susan: "I cannot stand any more ultimatums."

Jonathan: "This is my last one. Now tonight you tell him about us, or tomorrow, I tell him./253 Look at me, Susan./254 NOW TELL ME MY GOD DAMNED THOUGHTS!"/255



SCENE XXI (33:14)

JONATHAN PHONES SUSAN. THEY ARGUE AND PART COMPANY

(Susan walks slowly down the hall to answer the phone.) 256

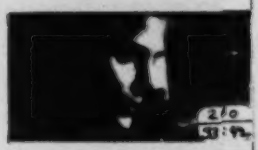
Susan: "Hello?" 257, 258

Jonathan: "You didn't do it, did you?"

Susan: "No." 259

Jonathan: "Why not?"

Susan: "He looks at me with such trust --" 260



Jonathan: "How do I look at you?"

Susan: "With bitterness."

Jonathan: "It used to be trust. At least you know my thoughts."

Susan: "Did you tell him?" 261

Jonathan: "What do you think?"

Susan: "No."

Jonathan: "So what do we do now?" 262

Susan: (Clear throat) "I don't know. I guess we get an ultimatum."

Jonathan: "Do you think there's any sense in this?"

(Pause)

Susan: "In what?"

Jonathan: "In you and me." 263

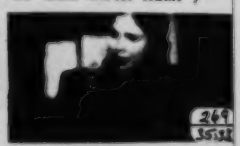
Susan: That's up to you."

Jonathan: "No, it's up to you. I don't see any point in it. I wish I were wrong./264 I don't feel anything any more."

(Pause.)

Susan: "Neither do I."/265, 266 (35:08)

Jonathan: "The reason/267 I didn't say anything to Sandy -- I knew he wouldn't believe me./268 And I'd go into detail so he would have to believe me -- and I knew he'd come running to you and I knew you'd tell him everything I said was true and I knew then you'd go to bed with him."/269



Susan: "Uh, yeah -- That's about like what would happen." (She is trying not to cry.)/270

Jonathan: (Sighs) "So."

Susan: (Crying) "So?/271 Jonathan -- I'll always be your friend."/272, 273

(She tries to laugh.)

Jonathan: (36:09) "Jesus, Susan, I hope not."/274

(She sobs. Phone hangs up.)/275

SCENE XXII (36:22)

SANDY AND SUSAN PACK FOR TRIP TOGETHER - JONATHAN WATCHES

(Focus on Jonathan's face only. Just sitting there, as Sandy and Susan talk.)

Sandy: "It's going to be buggy/276."

Susan: "How can it be buggy?"

Sandy: "It's the tropics --"

Susan: "What do you mean?"

Sandy: "The jungle!"

Susan: "Here -- cover yourself from head to toe."

Sandy: "Well, I'll get eaten alive."

Susan: "You don't know what it's like. You've never camped out before. Isn't it being silly, Jonathan?"

Sandy: "I am not."

Susan: "Are too."

Sandy: "Am not."

Susan: "Are, too. You're a real city boy."

Sandy: "How about a cot?"

Susan: "Come on, sweetie, we've got a sleeping bag."

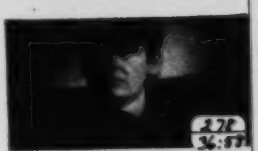
Sandy: "Are you really serious about sleeping on the ground?"

Susan: "You are a baby."/277

Sandy: "Christ -- that knapsack!"

Susan: "I told you you're overpacked. What in the world are you going to do with a pillow case?"

Sandy: "Put it back."



Susan: "Well, you are a nut. Isn't he a nut, Jonathan?"/278

Sandy: "You packed your things, let me pack mine."

Susan: "I'm just trying to help."

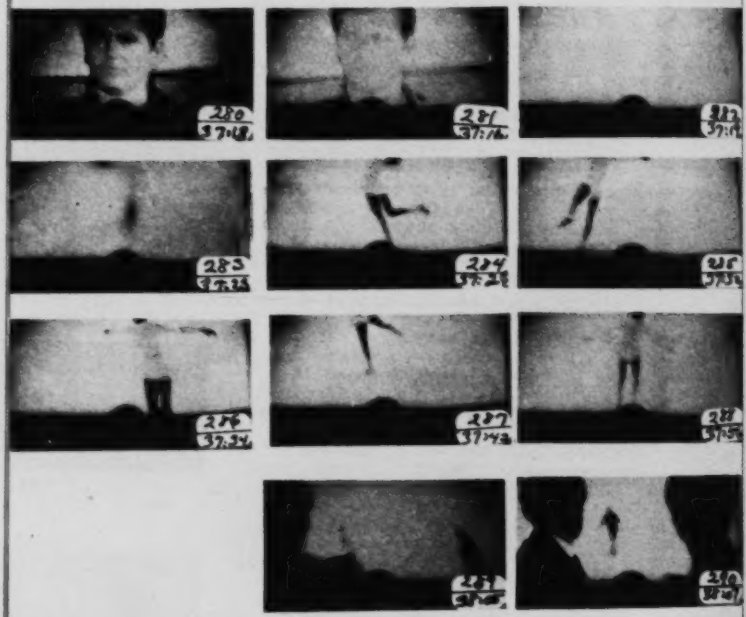
Sandy: "Well, help your own self. You have packing to do."

Susan: (Voice fading out) "You didn't leave enough room -- we're going in the woods with all this stuff --" 279

SCENE XXIII (37:19)

TIME JUMPS AHEAD ABOUT A DECADE TO THE LATE '50'S - JONATHAN AND SANDY MEET AT OUTDOOR SKATING RINK -- THEY DISCUSS PAST SEXUAL EXPERIENCES

(Organ music - at outdoor skating rink. They are watching a girl skater.) 280 thru 290



Jonathan: (38:06) "Jesus -- Do you want her?"

Sandy: "I wouldn't kick her out of bed."

Jonathan: "Would you look/ 291 at the pair on her?"

Sandy: "Get a look at that schmuck trying to keep up with her."

Jonathan: "They're always with guys like that."

Sandy: "That guy must be sixty if he's a day."

Jonathan: "Maybe he'll have a heart attack. You could save his life. Get his number and fuck her."/ 292

Sandy: (Laughs) "You bastard. You bastard."

Jonathan: "How's Susan?"/ 293

Sandy: "Couldn't be better."

Jonathan: "I always said it, and I say it now. You found yourself a jewel."

Sandy: "She is a jewel."/ 294

Jonathan: "Not bad,/ 295 that one."

Sandy: "Listen, you must be getting more than your share."

Jonathan: "I'd get married in a minute if I could find the right girl."

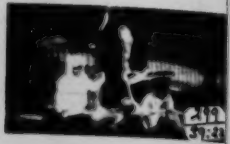
Sandy: "Bull shit artist -- you and your actress friends."/ 296

Jonathan: "Are you kidding, doctor? You're the one that's got the deal. I mean, what can I say? Take your clothes off, baby, I want to check your capital gains?"

Sandy: "I just look."

Jonathan: "Sure you do."

Sandy: "I really do./[297] Susan is plenty enough woman for one man. Hey -- look at that --"/[298, 299]



Jonathan: "That's Sally Joyce."

Sandy: "Didn't I see her on Ed Sullivan?

Jonathan: "I fucked her/[300] once."

Sandy: "Bull shit artist."

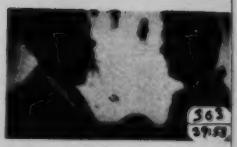
Jonathan: "I used to do her taxes. She's with/[301] another firm now."

Sandy: "Why don't you say hello?"

Jonathan: "She wouldn't remember me. She's a real ball-buster,/[302] that one. I've been through the mill with her kind."

Sandy: "Yeah."

Jonathan: "You think a girl goes for you, and you find out she's after your money or your balls. Or your money/[303] AND your balls. Women today are better hung than the men." (40:05)



Sandy: "I should have your problems."/[304]

Jonathan: "It's not/[305] as easy getting laid as it used to be. I don't think I fuck more than a dozen new girls/[306] a year now. Maybe I'm too much of a perfectionist. This last

one came so close to being what I wanted -- good pair of tits on her, not a great pair -- Almost no ass/307 at all, and that bothered me. Sensational legs. I would've settled for the legs if she had just two more inches here and three/308 more here. Anyhow -- that took two years outta my life."

Sandy: "You don't/309 want a family?"

Jonathan: "I don't wanta put it down -- but who needs it?"

Sandy: "You can't make fucking your life's/310 work."

Jonathan: "Don't/311 tell me what I can and can't do. You're so well off?"/312, 313, 314, 315

(Organ music. Then (41:20) switch to Sandy talking -- Jonathan's apartment.)

Sandy: "/316 Susan's a very good homemaker. Very efficient. I come home, everything's in its place, Which I like, because it's tiring putting in a full day at the office, then Doctors' Hospital for a couple of hours. So it's

"nice that everything's in its place when I get home. A Martini, dinner, 317 the kids -- We don't watch much television. We like to read aloud to each other. We used to have more friends than we do, but we don't have that many any more. 318 So--on weekends we might entertain a little or go over to see a friend -- come into town, see a play or a good film -- it's not glamourous or anything. 319 320 There are other things besides glamour."

SCENE XXIV (42:30)

JONATHAN AND BOBBI ON A DATE

(Music - Waltz from "Der Rosenkavalier.") 321

Bobbi: "You have a long life line." 322

Jonathan: "I like that. The way you run your nail across my, uh --"

Bobbi: "Uh -- difficult to get along with."

Jonathan: "Me?"

Bobbi: "Umm, hmmm."

Jonathan: "Bobbi . . ."

Bobbi: "Do you always know your own mind?" 323

Jonathan: "Right this minute, anyway." (Laughs)

Bobbi: "Do you always (--inaudible--) going after what you want until you get it?"

Jonathan: "Let me see your hand." 324

Bobbi: "Well?"

Jonathan: "You are built."

Bobbi: "Do you see that in my hand?" 325

Jonathan: "Even your hand is built."

Bobbi: (Laughs softly) "I think you're a dirty old man."

Jonathan: "I'm a dirty young man. How old are you?"

Bobbi: "How old do you think I am?" 326

Jonathan: "Nineteen."

(They both laugh.)

Jonathan: "Twenty."

Bobbi: "No." (Loud laughter.)

Jonathan: "Twenty-one? Twenty-two? Twenty-four?"

Bobbi: "You skipped twenty-three."

Jonathan: "Twenty-three?"

Bobbi: "No--" (They laugh)

Jonathan: "Twenty-four?"

Bobbi: "No!"

Jonathan: "Twenty-five? Twenty-six?"

Bobbi: "Nope."

Jonathan: "Twenty-seven? Twenty-eight?"

Bobbi: "No-o-o-o--"

Jonathan: "Twenty-nine? I like going out 327 with older women."

(Laughter)

(Riding in taxi) 328

Bobbi: "Are you married?" 329

Jonathan: "Are you kidding?"

Bobbi: "You don't wanna get married?"

Jonathan: "I'd marry you any time -- if -- can you cook?"

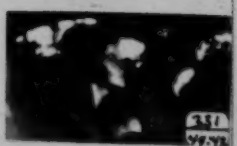
Bobbi: "Spaghetti!" 330

Jonathan: "I can cook spaghetti."

Bobbi: "Good! You do the cooking."

Jonathan: "What will you do?"

Bobbi: "What would you like me to do?" 331



Jonathan: "What would you like to do?"

Bobbi: "I asked you first."

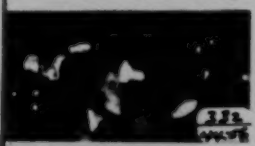
Jonathan: "Well, I'm not gonna answer you first."

Bobbi: "No? Sew!"

Jonathan: "It doesn't sound like much of a marriage. 332 Me cooking spaghetti and you sewing."

Bobbi: "Do you want a divorce? I'll take you for every cent you've got."

Jonathan: "I didn't know I was marrying a golddigger. 333 (45:08) (She laughs.) You won't take pity on me?"



Bobbi: "Only if you say you're sorry."

Jonathan: "I'm sorry --"

Bobbi: "And you'll never do it again."/ 334

Jonathan: "I'll never do it again."

Bobbi: "And you'll always be a good boy."

Jonathan: "Yes, mama."

Bobbi: "Would you like to be mothered?"

Jonathan: "I'd like to be smothered by you."/ 335

Bobbi: "What else would you like me to do to you?" (Pause)

SCENE XXV (45:40)

BOBBI AND JONATHAN GO TO HIS APARTMENT -- THEY ENGAGE IN SEXUAL INTERCOURSE

336, 337, 338, 339

(Footsteps)

Jonathan: "Well, how do you like it?"

Bobbi: "How do I like what?"

Jonathan: "Why, uh, you know --"

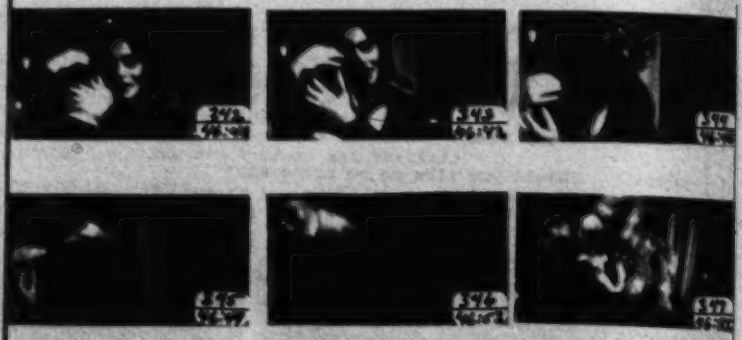
Bobbi: "What do I know?"/ 340

Jonathan: "You know everything."

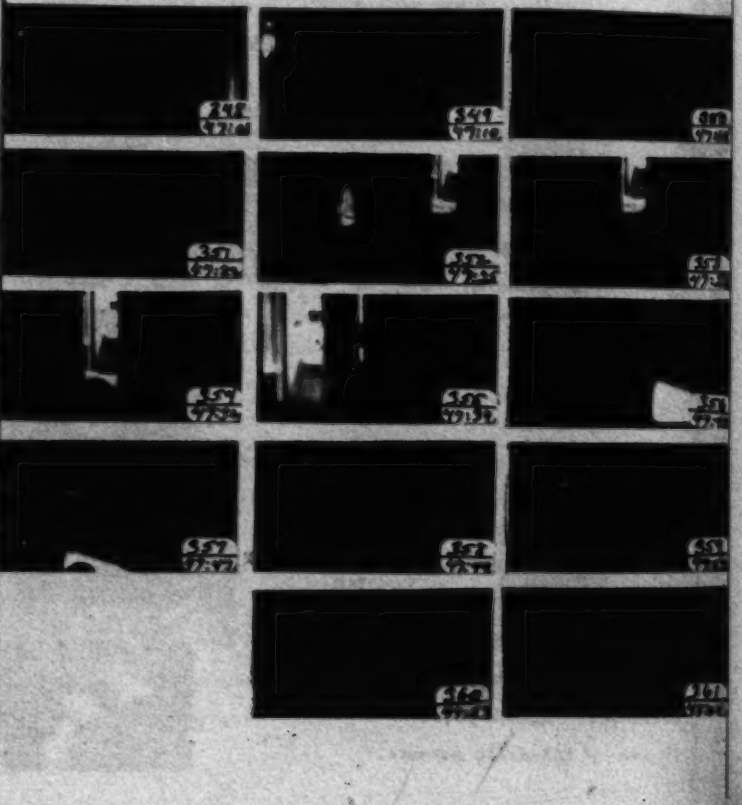
Bobbi: "I know you?"/ 341

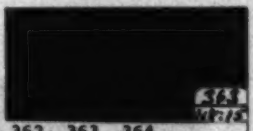
Jonathan: "I know you."

(Pause -- inaudible murmers.)



(47:00) (Record is playing -- Frank Sinatra singing "Dream".)
348
(Long interlude, loud sexual noises, moans, grunts, orgiastic sounds.)
349 thru 361





Jonathan: "Well. I almost came that time."/ 362, 363, 364

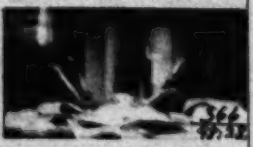
(She bursts out laughing. He laughs, too.)

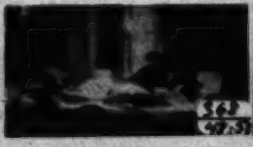
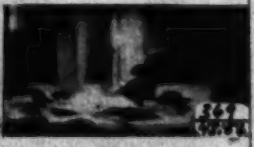
SCENE XXVI (48:2/)

JONATHAN IN SHOWER INVITES BOBBI TO JOIN HIM. SHE DOES.

(Baroque organ music.) / 365

Jonathan: (Calling from shower) "Help!"/ 366, 367, 368 (moaning sound -- inaudible words --) "Oh, nurse!"/ 369

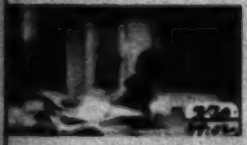


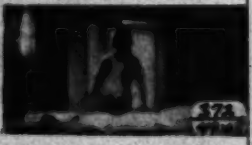



Bobbi: "What is it, Mr. Wifendorf?"

Jonathan: "Will you come in here a minute, please?"

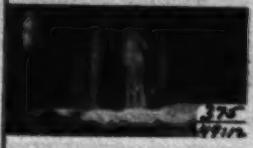
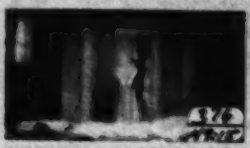
Bobbi: "Certainly, Mr. Wifendorf."/ 370 thru 374





(Bobbi, completely nude, walks to shower and opens door.)

Bobbi: "Why, Mr. Wifendorf!!!"/375, 376, 377

SCENE XXVII (49:25)

JONATHAN'S BEDROOM. BOBBI ASKS JONATHAN TO "SHACK UP" WITH HER

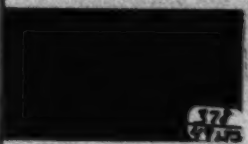
Bobbi: /378 (Sexual sighs) "All us cunts adore pricks. At every moment they want up --"

Jonathan: "I'll be happy to tell you./379 They want the boodle -- (she giggles) but they ain't gonna get the boodle."

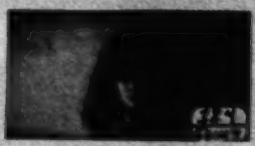
Bobbi: "Got 'em dead to rights."

Jonathan: "Because this kid here's got the boodle."

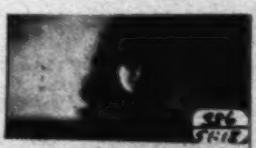
Bobbi: "Pretty sure of yourself, aren't you?"/380 (Sighs) "You're a nice man."



Jonathan: "And you're a very lucky girl."/381 thru 385



(Noise of door shutting.)

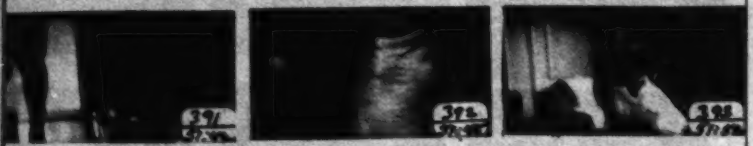


Bobbi: "You know something, Jon?"/386

Jonathan: "What is it, sweetheart?"

Bobbi: "Do you think it would be a/387 fatal mistake in our lives if we shacked up?"/388, 389, 390

Jonathan: "It's very difficult, Bobbi -- in the last couple of weeks,/391 we get along so well together./392 The idea/393 --

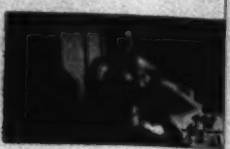


I like you very much. (52:02) So much -- this idea -- to be perfectly honest, I mean -- it sounds very good to me./394 Let's both give it a couple of days to think about it. It sounds like -- um, very good./395 Very, very, uh -- well, good. Only our eyes should be open. We should go into this -- we should know exactly what we're getting into."

Bobbi: "It's just a shack-up./[396] I'm not asking for your hand in marriage."

Jonathan: "Yes? Well, as long as we both understand that.[397]"

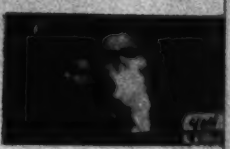
Bobbi: "We do."/[398]



Jonathan: "I just thought it's better to get it all out on the table. So later there will be no possibility of misunderstanding. I don't/[399] know how many business deals I've seen come to grief --/[400]."

Bobbi: "Okay -- you're a real prick, you know that?"/[401, 402]

Jonathan: "--Prick--"/[403, 404]



SCENE XXVIII (53:44)

RESTAURANT - JONATHAN AND SANDY REMINISCE

Jonathan: "I could very easily get serious about this girl. She's a lot of fun to be with./[405] This is just between the two of us, but -- for the last year or so, I've, I've been having -- I don't know -- a little trouble. I wasn't worried, but, still and all, a little trouble. Well, myself, y'know,

-- getting hard. It took a long time. You know how girls are today, they judge you. They judge you very quickly./406 So -- I had a real rough time, a couple of times. Very nasty innuendos./407 Like I say -- I wasn't too worried, but -- I won't lie to you. I was a little worried. Then along comes this Bobbi. I get one look at the size of the pair on her, and I never had a doubt I'd ever be anything but okay again./408 And I was...I was.

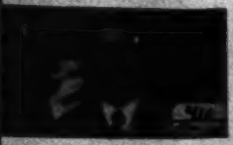
Well, with all our kidding back and forth on our first night together, I don't mind tell-
ing you I had tears in my eyes."

Sandy: "She's/409 really the girl in the girl in the airline commercial? You lucky son of a bitch."

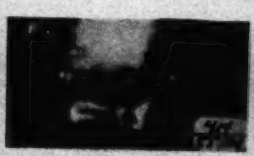
Jonathan: "I don't know./410 I don't wanta get in over my head. I got in over my head three - four times already. And, uh -- you have to be a real bastard. I don't like being put in that position. What would you do?"

Sandy: "If she looks anything /411 she looks on television --"

Jonathan: "Size 38,/412 with a D cup."



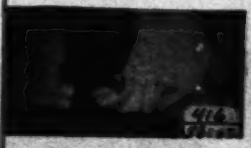
Sandy: "Well, looks 413 aren't everything."
Jonathan: "Believe 414 me, looks are everything." 415
Sandy: "Maybe."



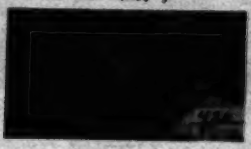
SCENE XXIX (56: 3)

BEDROOM SCENE

(Jonathan lies on his back with legs over edge of the bed. Bobbi kneels on floor alongside bed with her head between his legs.) 416
Jonathan: "I'm hungry." 417
Bobbi: "I'll get up." 418, 419



Jonathan: "Why do we always have to eat so 420 late?"
Bobbi: "'Cause I work 421 late, dumbbell."
Jonathan: "Why do you work at all?" 422



Bobbi: "It brings in extra money."
Jonathan: "I make enough."
Bobbi: "Do you want me to quit 423 working?"
Jonathan: "Thought you were bored with it."
Bobbi: "I am." 424
Jonathan: "So quit."

Bobbi: "What'll I do?"

Jonathan: "What do other women do?"

Bobbi: "Have children?/ (Noise) Well, you asked me!"/ (Noise of shower.) (Radio music/-- Dick Powell singing "I'll String Along With You.")

425, 426, 427 428

429 thru 435

SCENE XXX (57:46)

BOBBI PREPARES DINNER - THEY TALK

(Radio program going on --)

Man: "Hey, was that you?"

Man: "Yeah, that was me."

Man: "No kiddin'!"

(Various inaudible remarks -- "I was sure it was his voice" -- (--inaudible--). "I told you I wanted it" -- (--inaudible--) "Bo-do-dee-o--" (--inaudible--) "Yeah?" (--inaudible--) "Come on let's go" -- "we're on our way to a (--inaudible--) "All, right (--inaudible--) go ahead --").

Jonathan: "What about my beer?"

Radio Voice: "Ladies and gentlemen, it has been --"

Bobbi: 'We're all out --/"

Voice: (--inaudible--) has something to say to you. A change in program is necessary."

Jonathan: "I really wanted a bear --"

Bobbi: "Do you want me to run out to the corner?"/436

Jonathan: "You're too tired." (--inaudible--)

Bobbi: "I'm tired, but I'm all right."

Jonathan: "I'll get it."

Bobbi: "No, I'll get it."

Jonathan: "It was my fault. I knew I should have reminded you when I called this afternoon."

Bobbi: "I'm sorry --"

Jonathan: "You're more tired now than when you were working."

Bobbi: "I'm in the house all day."

Jonathan: "Didn't you get up at all today? What'd'ya do? I mean, when you're not telephoning."

Bobbi: "I'm not on the phone that much."

Jonathan: "It took me forty-five minutes to get through this afternoon."

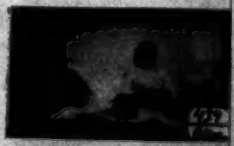
(Singing - "You may not be an angel --")

Jonathan: "I'll go and get the bear."

Bobbi: "I'll go."

Jonathan: "I thought you were too tired."

Bobbi: "I haven't been out all day."/437



Jonathan: "Fresh air will do ya good."

Bobbi: "Will you walk with me?"

Jonathan: "I may as well go myself."

(Pause)/438

Jonathan: "Want to make love?
We haven't in a week."

Bobbi: "It was a week?"/439

SCENE XXXI (61:13)

SANDY TELLS JONATHAN OF HIS SEX LIFE WITH SUSAN

Sandy: "That's right. Susan and I do all the right things. We undress/440 in front of each other -- we spend 15 minutes on foreplay, we experiment, do it in different rooms -- it's a seven-room house -- We don't believe in making a ritual out of it. We do it when we feel like it. We don't feel we have to be passionate all the time. Sometimes it's even more fun necking. We're considerate of each other's feelings. I had a tendency -- men, I guess, have -- to be selfish./441 But I stopped. I don't do that now. We try to be patient. And we are patient -- and gentle with each other. (Sighs.) (Pause) Maybe it's just not meant to be enjoyable with women/442 you love."/443

Jonathan: "Sandy -- do you want to get laid?"/444

Sandy: "Please."

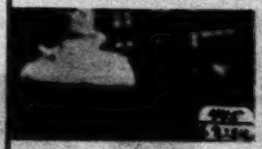
SCENE XXXII (62:29)

AT TENNIS COURT - JONATHAN AND SANDY REGARD CINDY, TO BOBBI'S ANNOYANCE

(Game is not shown. Jonathan and Sandy are playing, then Jonathan

and Cindy. Bobbi watches at first, then turns her back in disgust.)/ 445, 446

Sandy: "Very nice. Very nice indeed./ 447 Cindy, put your (--inaudible--) I almost had it."



Jonathan: "Sure, you almost had it."

Sandy: "Almost had it, right, Cindy? See that, Cindy?"

Jonathan: "He was lucky!"/ 448

(They are shouting - voices confused.)

Man: "That's all! Bastard -- That was out."

Man: "Bull shit it was."

Man: "Oh, bull--."/ 449

Jonathan: "Yeah, let Cindy be the judge."

Sandy: "We'll do it over, all right?"

Jonathan: "Right. Fair's fair."/ 450

Sandy: "Deuce! You see that shot, Cindy?"

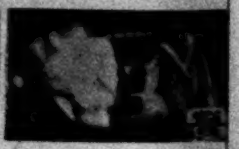
Jonathan: "Now we got -- tennis!"

(Grunts, etc.)

Man: "Game!"/ 451

Man: "Luck!"

Jonathan: "Luck my ass!/ 452 Hoo, hoo! You want to take me on, Cindy?" 453



Bobbi: "It's my turn."

Jonathan: "Aw, c'mon, Bobbi -- you're so awful."/454

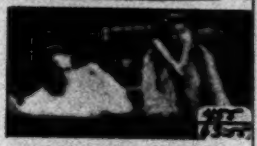
Jonathan: "You serve. Very nice! Hey, you play well. Hey, Sandy,/455 will you look at this girl?"

Sandy: "Terrific, Cindy!"

Jonathan: "Whoo! Hey, she's backin' me up! I'm not kidding, look at this -- she's backin' me up!"

Sandy: "Beautiful!"/456

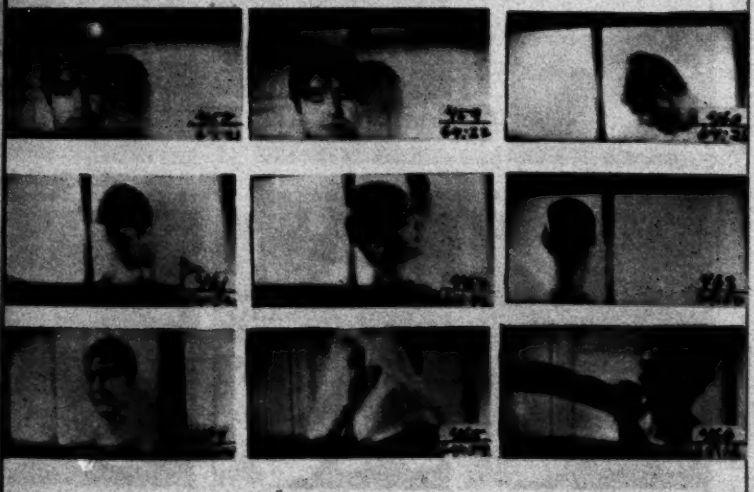
Jonathan: "Boy -- will you look at this? 40-Love. And I'm not takin' it easy on her,/457 either."



SCENE XXIII (64:08)

JONATHAN'S BEDROOM. JONATHAN AND BOBBI ARGUE

(Sound of water running. Long pause.)/458 thru 471



Jonathan: "You and Lord and Taylor's are gonna have to work out a trial separation."/ 472

Bobbi: "I had the water running. What did you say?"/ 473

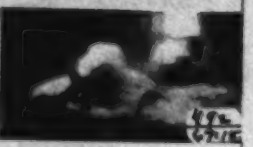
Jonathan: "You and Lord and Taylor's are going to have to work out a trial separation."/ 474, 475, 476

(She walks over and looks.)

Bobbi: "Look at the date. Five months have gone."/ (Pause) 477 thru 482

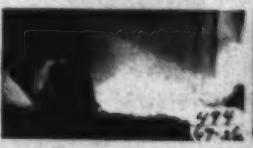
Bobbi: "Sorry I cost you so much money." 483

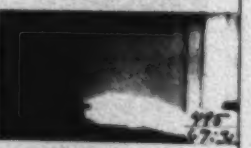
(Phone rings six times. 484 thru 492 Unanswered. Long Pause.)

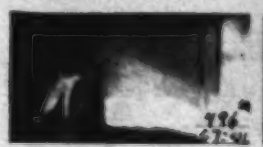


Bobbi: "I want to get married." 493, 494

(Door slams.) 495, 496, 497







Bobbi: "Are you tired of me, Jonathan? The answer's yes."

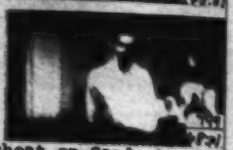
Jonathan: "I didn't say yes."

Bobbi: "You said 'am I ever'. I need more in life than this."

Jonathan: "Who put you up to this? Your psychiatrist? After a long, exhaustive bed hunt you've finally chosen me."

Bobbi: "Cindy's not 498 a virgin either."

Jonathan: "What? oooohh, I get it — is that 499 what brought this on? Your mind is unbelievable. You have to have a low opinion of me, thinking that I would do that to Sandy."



Bobbi: "Oh, no -- you wouldn't want to cheat on Sandy."

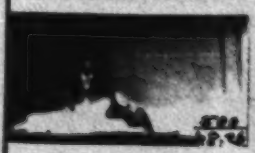
Jonathan: "Ooohh, now it's Sandy."

Bobbi: "Well, he spends 500 half his life over here."

Jonathan: "Wait a minute. A second ago, you had me screwing Cindy. Who am I screwing now? Sandy??"

Bobbi: "You're going 501 too fast for me."

Jonathan: "I'm going too fast for YOU. Your little mind operates like an IBM - like a pinball machine. First, Cindy. Oh, no, not Cindy. How about Sandy? 502



How about Cindy and Sandy? Talk about the pot calling the kettle! The day I got an earful of your checkered past I felt like a celebate!"

Bobbi: "You 503 made me tell you."

Jonathan: "Sure, I twisted your arm."

Bobbi: "It got you hot." 504

Jonathan: "Something has to." 505 (Door slams.)

Bobbi: "You have such contempt for me."

Jonathan: "Kid, you worked hard for it. [506] It's yours."

Bobbi: "The way you paw me at parties."

Jonathan: "How, affection is contempt. [507] Upside down. Everything upside down."

Bobbi: "Feeling me up in public is not affection."

Jonathan: "Will you come on --." [508]

Bobbi: "I know that I sleep all day. [509] I know I'm doing a terrible job, but you're not helping me any."

Jonathan: "And who helps me?"

Bobbi: "I help you." [510]

Jonathan: "Your kind of help I can do without." [511]

Bobbi: "Can you? Can you really?" [512]

Jonathan: (Frustrated noises.) "You'll do anything you can to ruin my day, won't you? I got up today feeling so good. [513] You couldn't leave us alone. (Slamming sound.) We were doing so well."

Bobbi: "What?"

Jonathan: "At one time -- at one time it was GREAT what we had. The kidding around, it can't have a natural span.

Affairs can't 514/ dissolve in a good way -- there's always got to be poison. I don't see why. I REALLY DON'T SEE WHY?"

Bobbi: "Jonathan -- do you want it over between us?"

Jonathan: "Why does it have to be one way or the other?"

Bobbi: "You don't want me to leave?"

Jonathan: "I want you right here -- where you belong."

Bobbi: "And what 515/ about you?"

Jonathan: "When I'm here, I'm here. When I'm not here, I'm -- I'm there."

Bobbi: "Where?"

Jonathan: "Where ever!"

Bobbi: "Yeah. I'm a man-eater or a ball-bustering castrater. I WANNA GET MARRIED."

(Jonathan is slamming things around on the dresser.)

Jonathan: "ALL RIGHT. Where the fuck is my shoehorn? This place is a mess. There's not any food in the house -- half the time you look like you fell outta bed. You spend more time in bed than any other human being past the age of six months that I ever heard of."

Bobbi: "The reason I sleep all day is 'cause I can't stand my life!"

Jonathan: "What life?"

Bobbi: (Crying) "Sleeping all day!" (She is sobbing.)

Jonathan: "For that sort of thing, I'd fall in love with you all over again."

Bobbi: "Marry me, Jonathan -- please marry me."

Jonathan: "You're trying to kill me."

Bobbi: "Marriage isn't death."

Jonathan: "Why now?"

Bobbi: "Because two years ago I slept - eight hours. A year ago, it was twelve. It's up to fifteen now, pretty soon it's gonna be twenty-four."

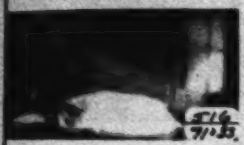
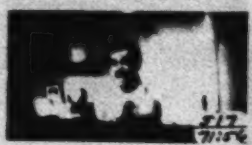
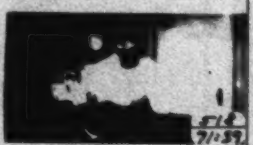
Jonathan: "What are you trying to do -- scare me?"

Bobbi: "I need a life."

Jonathan: "GET A JOB!"

Bobbi: "I don't want/ 516 a job. I want you." (Sobbing.)

Jonathan: "Don't take/ 517 and blame me! Get out of the house!/ 518 Do something useful, God damn it!"

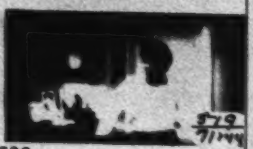




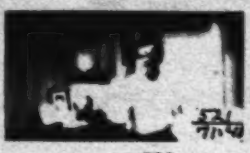
Bobbi: "You wouldn't let me work when I wanted to."

Jonathan: "That was a year/ 519 ago."

Bobbi: "You throw a tantrum every time you call and I'm not home."/ 520

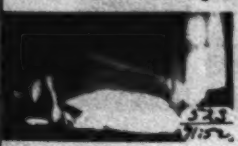
Jonathan: "Look, sister,/ 521 I'm out there in the jungle. EIGHT HOURS/ 522 A DAY."

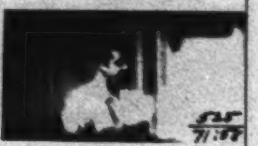




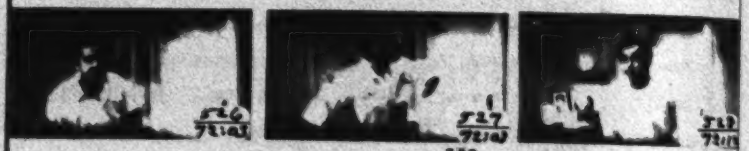
Bobbi: "You wouldn't even let/ 523 me canvas for Kennedy."

Jonathan: "YOU WANT A JOB?/ 524 I GOT A JOB FOR YOU. Fix up this pig sty./ 525 You get a pretty God damn good salary for testing out this bed all day.

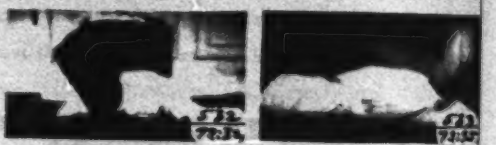




You want an extra fifty dollars a week?/526 TRY VACUUM-
ING. You want an extra hundred? MAKE THIS GOD DAMNED
BED./527 TRY OPENING SOME GOD DAMNED WINDOWS -- THAT'S
why you can't/528 stand up in here.



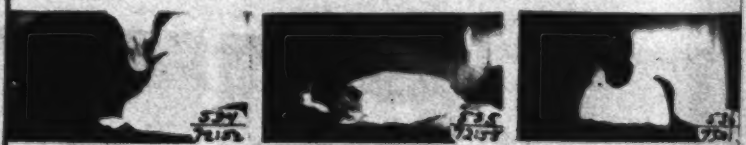
The Goddammed place smells/529 like a coffin. Ooooh,
Bobbi,/530 you don't need me. Why do you let yourself in
for this kind/531 of abuse? Walk out! Leave me, please
leave me. For God's/532 sake, I'd almost marry you if
you'd leave me."/533



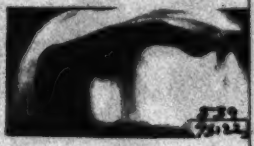
Bobbi: "You call that abuse -- you don't know what I'm used to.
With all your carrying on -- pretending you're
a gift. (Pause.) So what's it gonna be?"/534

Jonathan: "You sure know how to screw things up."

Bobbi: "So where/535 does that leave us?"/536



Jonathan: "Are you giving me an ultimatum? Is this an ultimatum? Answer me, you ball-busting, castrating, son of a cunt-bitch./[537] Is this an ultimatum or not? Because if it is, I'm gonna tell you what you can do with your ultimatum. I'm gonna tell you what you can do with it/[538] -- You can make this God damn bed -- that's what you can do with it! (Inaudible) TAKE OFF THESE FILTHY SHEETS, THAT'S WHAT YOU CAN DO WITH IT!"/[539]



SCENE XXXIV (73:19)

JONATHAN'S APARTMENT. JONATHAN AGREES TO SWAP BOBBI FOR CINDY. BOBBI ATTEMPTS SUICIDE.

(Doorbell rings.)/[540, 541]

Jonathan: "She's not ready."/[542]

Sandy: "We're a little early."

Jonathan: "You're looking good, Cindy."

Sandy: "I do my best."

Cindy: "Will Bobbi be long?"

Jonathan: "Uh, -- no./[543] Say, ah -- do we have to go to this party?"

Sandy: "How about it, Cindy?"/[544]

Cindy: "Where's the powder room?"

Jonathan: "Uh -- right there."

Cindy: "I'm going. You do what you want."/545

Jonathan: "Man -- she's really something."/546

Sandy: "I'm so bored I'm goin' out of my mind."

Jonathan: "Bored! With that? You must be kidding. Do you have to go to this party? Stick/547 around."

Sandy: "No. It's better that I go."

Cindy: /548"Here, I just did my hair./549 (Looking around the apartment.) I've got this at home. How's your tannis game, Jonathan?"

Jonathan: "We'll have to have a rematch."

Cindy: "Any /550time!"

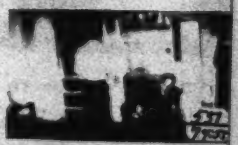
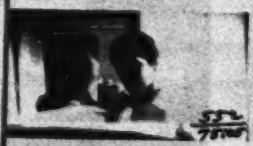
(Music) /551, 552

Jonathan: "Is she always that way?"

Sandy: "You know what she is?"

Jonathan: "Boy, is she competitive."

Sandy: "She is very competitive./553 But I find that attractive."

Jonathan: "You know her problem? She wants balls."/554

Sandy: "She's all right."

Jonathan: "I'm not criticizing."

Sandy: "I wish she were more feminine."

Jonathan: "She's a little masculine, Huh?" 555

Sandy: "I just wish -- she wouldn't always demand her own way."

Jonathan: "Got a great body on her."

Sandy: "I have to treat her like a child. 556 Give her everything she wants."

Jonathan: "I wouldn't mind giving her something."

Sandy: "You got Bobbi. I sure 557 don't have it that good."

Jonathan: "Bobbi? Are you kidding?"

Sandy: "I've never seen a body like that." 558

Jonathan: "She can do with a little more of what Cindy's got. She's so Goddamned passive."

Sandy: "Yeah? I wouldn't mind Cindy just lying still once." 559 She's so busy giving instructions in bed it's like close order drill."

Jonathan: (Laughs) "Yeah? I wouldn't mind a little of that. As long as she doesn't forget who's boss." 560

(Low conversation over music.)

Jonathan: "You wouldn't want to swap her sometime, would you? 561,562,563
(Laughter.)

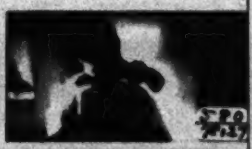
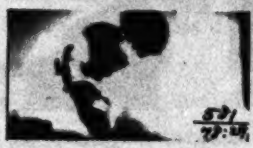
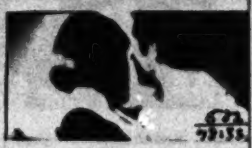
Jonathan: "What do you say?/ 564 Might liven things up a bit."/ 565, 566
(They giggle.)

Jonathan: "She can miss one party. We've heard of (--inaudible--
Sandy: "What about Bobbi?"
Jonathan: "She's so mad at me,/ 567 she'll jump all over you just for revenge. (Laughs.)
Sandy: "Hmmm, you like that,/ 568 huh? Seriously --"
Jonathan: "She's in the bedroom. If you're quiet, you can do it, and she won't even know."/ 569 (Laughter from both.)

Jonathan: "Hmmm./ 570 Give me a minute."/ 571, 572

(New tune - "Amapola" starts.)/ 573, 574

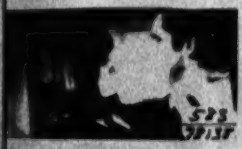
Cindy: "Tell Sandy it's time to leave. (They are dancing.)
/ 575 I hope you dance better than you play tennis."/ 576 thru 582

Jonathan: "Sandy won't mind --"/583

Cindy: "What's Sandy got to do with it?"/584

Jonathan: "You're his girl. (Pause.)/585, 586 He said it would be okay./587, 588



(Music stops.)

Cindy: /589 "What did Sandy say?"

Jonathan: "Aaahh -- you and me,/590 uh -- you know."/591

Cindy: "That was his idea -- you had nothing to do with it."

Jonathan: "A little."

Cindy: "A little? Or a lot?"

Jonathan: "This much." (Measures with hands.) 592

Cindy: "I'm surprised it took you this long to get around to it." (She walks towards door.) 593

Cindy: "Sandy 594 and I have a party to go to."

Jonathan: "Sandy's busy." 595 (She walks back towards him.) 596 thru 600

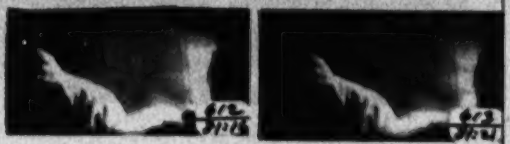
Cindy: "If you want to come around sometime by yourself -- that's one thing. I've been expecting that. But you tell Sandy -- that if he lays one hand 601 on that tub of lard in there, not to come home. 602 So you call me." 603,604,605

(Steps. Long pause.)

Jonathan: "Jesus."/606, 607, 608

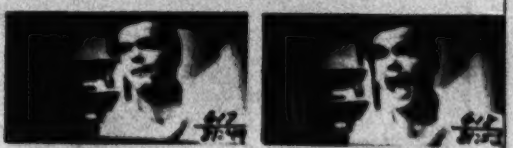
(Pause. He walks over, opens bedroom door. Bobbi lying on bed - Sandy is on the phone.)

Sandy: "She's/609 semi-comatose. Better send a resuscitation unit and an airway./610 Uhhh, be ready to give her an IV on admission,/611 (''inaudible'') Tell 'em/612 we'll put her in intensive care. (Pause. He looks at Jonathan.) Bastard."/613



(Sound of running -- door slams.)/614, 615, 616

Jonathan: (Screaming) "VERY SLICK. VERY CLEVER./617 BUT IT'S NOT GOING TO WORK,/618 BOBBI!"



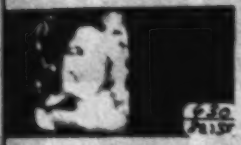
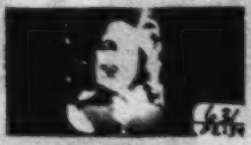
SCENE XXXV (82:12)

TIME JUMPS TO THE LATE '60'S. SANDY AND HIS HIPPY GIRL FRIEND ARE IN JONATHAN'S APARTMENT. JONATHAN, USING A SLIDE PROJECTOR, PROJECTS PHOTOS ON A SCREEN OF GIRLS WITH WHOM HE HAS HAD SEXUAL EXPERIENCES.

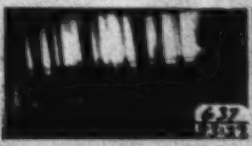
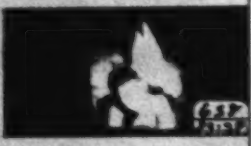
(Organ music - ice skating theme.) 619 thru 627

Jonathan: "That's Bonny. My first love. 628 She lived upstairs from us. We started exposing ourselves to each other at ten. We got caught on the roof one day by my mother, 629 who washed my mouth out with soap. I never got the connection." (Laughter.) Here's Emily. My first steady, until she moved off the block at eleven. I never laid a hand on her.

"Uh, Mildred/630 -- I think this one's name was. She followed me around/631 at school. The fellows kidded me about her. I warned her, if she didn't stop, I'd beat her up. She picked up her skirt, dropped her drawers and shoved her ass/632 at me. So I got my first sight of ass at twelve./633 Marsha/634 13 and 1/2 - thereabouts. I kissed her one night at a spin-the-bottle party./635

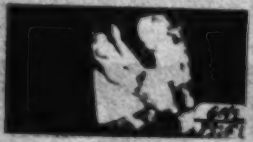



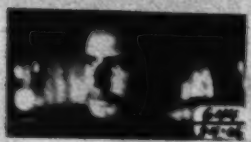
This one's Rosalie./636 Rosalie looked just like Elizabeth Taylor in "National Velvet". Had a crush on Rosalie from 14 to 15 and I never went near her. In those days we had illusions./637 Here's /638 Charlotte. Not much on looks, but great tits for fifteen.

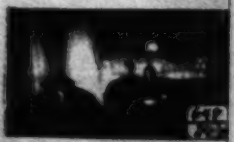
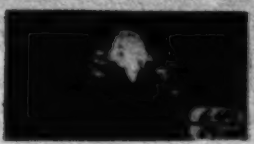
That's /639 Lenny Hartman's sister -- my first French kiss 16 years old. Here's Gloria./640 The best built girl in Ervander Child's.

I took her to the Bronx Zoo once and on the bus, copped a cheap feel. 641, 642 Here's Gwendolyn. I went with her for a year trying to get her to put out -- but she thought I was too nice and was saving me for marriage. Every guy at Ervander must have gotten into her pants except me. Here's my first 643, 644, 645 - (84:03) no, that one was a mistake.





Here's Eileen -- my very first fuck. She was a modern dancer at the Swarthmore. Great body on her -- what a waste. Frigid. 646, 647 Here's Nancy - a sweet kid. She went in for biology -- very frigid. 648, 649, 650

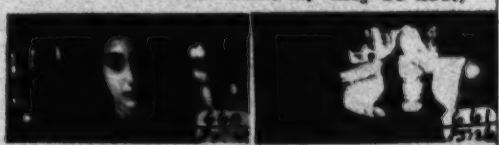



Here's Bobbi! My wife -- fastest tits in the west. And the king of the ball-busters. She conned me into marrying her, now she's killing me with alimony.

651
Wonder how this one got in here? This is my little girl, Wendy. Princess, I call her. Isn't she a dreamboat? 652, 653

Here's a real cunt. I forget her name -- a Nazi. I banged her in Berlin. 654, 655 Here's somethin' I want with for a couple of months. First time I banged her was on a yacht race to Nassau. 656, 657 This slob I want with for a year, until I got so sick of her ball-busting I couldn't get it up any more. I can't remember her name. 658,659

This was my Jap in the sack. I heard that Oriental girls were different -- not in America, they're not. 660, 661



Here's a sixteen year old I gave twenty bucks to one night in the Village when I was drunk. Maybe you know

her, Jennifer, she gave me a dose./662, 663, 664

(Nonsense --stuttering) That's all, folks! (Pause)

What're you crying for, it's not a Lassie movie!"

(Pause.)/665 thru 671

SCENE XXXVI (87:01)

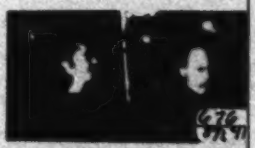
NIGHT SIDEWALK SCENE, JONATHAN AND SANDY WALK AND TALK /672

(Traffic noice. Horns blowing)

Jonathan: "Sorry about that."

Sandy: "So? What else is new?"/673

Jonathan: "To tell you the truth, I don't see anybody any more."



Sandy: "Neither do we."/674

Jonathan: "Well -- you got each other. I thought she was your daughter when you first came in./675

Sandy: "In a lot of ways, she's older than I am."

Jonathan: "Yeah."

Sandy: "She knows worlds I can't even begin to touch yet."

Jonathan: "Sandy, please --"

Sandy: "I found out who I am."

Jonathan: "You're/676 in big trouble."

Sandy: "The same old Jonathan."

Sandy: "The same old Jonathan."

Jonathan: "(--inaudible--) better place."

Sandy: "Let me talk to her about you, Jonathan."

Jonathan: "Talk to her about me! I'm forty -- she's NINE!"

Sandy: "You just don't get it, do you?"

Jonathan: "Oh, I get it all right. I've been getting it for a long time. What's the point?/677 Sandy, you've found a good piece a ass. God bless ya. You're my friend. I'm happy for you -- as long as it lasts, I'm happy for you. You deserve to be happy -- I mean it. Why fight? OK? All those games -- Jesus Christ."

Sandy: "You don't need those games,/678 Jonathan. I know -- I've played more games than anyone. The obedient son game, the bright student game, the cocksman's game, the respectable husband game, the good father game, the specialist game --"

Jonathan: "Al right."

Sandy: "Games don't impress Jennifer -- just life -- just love."

Jonathan: "Yeah. Well, I don't wanta argue with you, Sandy -- so let's just agree to, uh, disagree, OK? Don't make me mad, OK?"

Sandy: "Jennifer /679 knows more at 18 than Susan knows to this day."

Jonathan: "You've found yourself a real jewel, OK?"

Sandy: "She's my love teacher."

Jonathan: "You finally got it up, huh?"

Sandy: "You give off such bad vibrations."

Jonathan: "Bad vibrations. Sandy,/680 I love you, but you're a schmuck. You were always young, Sandy -- open. You were schmucky a lot of the time, but maybe schmuckiness is what ya need to stay young and open. Listen. Don't listen to me. You're doing great, and I'm makin' money."/681

Sandy: "You can find what I've found, Jonathan."

Jonathan: "Don't make me insult you."

(Sound of sirens, throughout, grows louder,)/682

SCENE XXXVII (89:30)

PROSTITUTE, LOUISE, PERFORMS FELLATIO ON JONATHAN IN HIS APARTMENT /683,684,685,686

Jonathan: "Women."

Louise: "All ball-busters, right?"

Jonathan: "You know it./ 687 You think of some of the things he has to dip into -- any guy with a conscience has a right to turn soft. Am I right, Louise?"

Louise: "You're always right, lover."/ 688

(Jonathan lies down on bed, spreads legs. Louise kneels between them, her arms on his legs.)

Louise: /"I don't think we're gonna have any/ 689, 690, 691 trouble tonight." 692

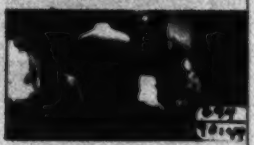
Jonathan: "Ya don't."

Louise: "No, I don't."/ 693

Jonathan: "You sure?"

Louise: "You wanna bet?"

Jonathan: "How much?"/ 694



Louise: "The sky's the limit!"

Jonathan: "All right."

Sandy: "Games don't impress Jennifer -- just life -- just love."

Jonathan: "Yeah. Well, I don't wanta argue with you, Sandy -- so let's just agree to, uh, disagree, OK? Don't make me mad, OK?"

Sandy: "Jennifer 679 knows more at 18 than Susan knows to this day."

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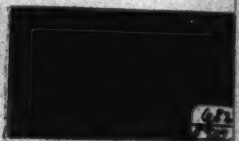
Sandy: "You can find what I've found, Jonathan."

Jonathan: "Don't make me insult you."

(Sound of sirens, throughout, grows louder,) 682



SCENE XXXVII (89:30)

PROSTITUTE, LOUISE, PERFORMS FELLATIO ON JONATHAN IN HIS APARTMENT 683,684,685,686

Jonathan: "Women."

Louise: "All ball-busters, right?"

Jonathan: "You know it./ 687 You think of some of the things he has to dip into -- any guy with a conscience has a right to turn soft. Am I right, Louise?"

Louise: "You're always right, lover."/ 688

(Jonathan lies down on bed, spreads legs. Louise kneels between them, her arms on his legs.)

Louise: /"I don't think we're gonna have any/ 689, 690, 691 trouble tonight." 692

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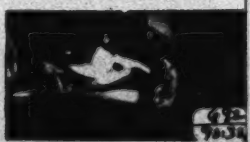
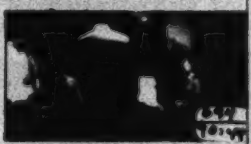




Louise: "The sky's the limit!"

Jonathan: "GOD DAMN!!" (He jumps up, paces room angrily.)

Louise: "What did I do?"

Jonathan: "You're doing it all wrong."

Louise: "I'm doing it like always."

Jonathan: "You never said that before."

Louise: "Said what?"

Jonathan: "SKY'S THE LIMIT."

Louise: "Sure I did."

Jonathan: "Never."

Louise: "What do I say?"

Jonathan: "You've forgotten it." 695

Louise: "Uuhhh — a hundred. I say a hundred." (Pause.)

Jonathan: "Okay."

Louise: "It just came out."

Jonathan: "I just want it right, that's all." 696

(He lies down again; they resume places and start dialogue routine over.)

Louise: "I don't think 701 we're gonna have any trouble tonight." 702

Jonathan: "You don't."

Louise: "No. I don't."

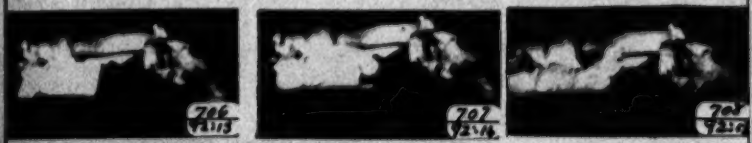
Jonathan: "Are you/ 703 sure?"/ 704

Louise: "You wanna bet?"/ 705

Jonathan: "How much?"/ 706

Louise: "A hundred?"/ 707 thru 710 (Pause)

Jonathan: "You sound pretty/ 711 sure."



Louise: "Your kind of a man/ 712 -- why shouldn't I be sure?"/ 713

Jonathan: "What/ 714 kind of man am I?"/ 715

Louise: "A real man. A kind man."/ 716

Jonathan: "I'm not kind."

Louise: "I don't mean weak-kind, the way so many men are. I mean the kindness/717 that comes from enormous strength from within -- a power so strong that every act -- no matter what -- is more proof/718 of that power. That's what all women resent. That's why they try to cut you down. Because of your knowledge/719 of yourself --

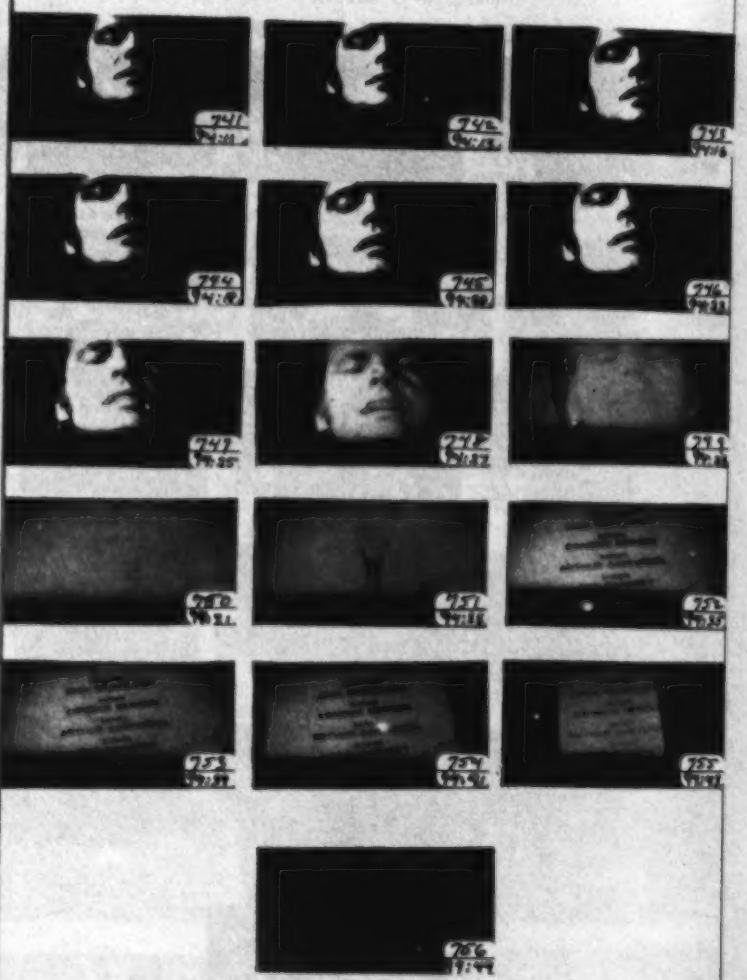
and them is so right, so true that it exposes the lives which they, every /720 scheming one of them, live by. It takes /721 a true woman to understand the purest woman form of love is to love a MAN --

who denies/722 himself to her. A man who inspires/723 her -- worship/724 -- because he has no need/725 for any woman/726 -- Because he has himself./727

728 /(--inaudible--) better -- more beautiful,/ 729 more powerful, more perfect -- you're getting hard/ 730 --

more strong,/ 731 more masculine,/ 732 more extraordinary -- /733 more --robust!/ 734 -- It's rising,/ 735 -- more virile, domineering,/ 736, 737 more irresistible/ 738, 739, 740 -- It's up. (--inaudible--)."

(Loud music.)



(Ice skater is shown again, skating, as film ends.)

THE END

APPENDIX B

Time-Motion Study* of Film "CARNAL KNOWLEDGE"

B-1 thru B-27

*A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner.

"CARNAL KNOWLEDGE"
Part 1 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-2-

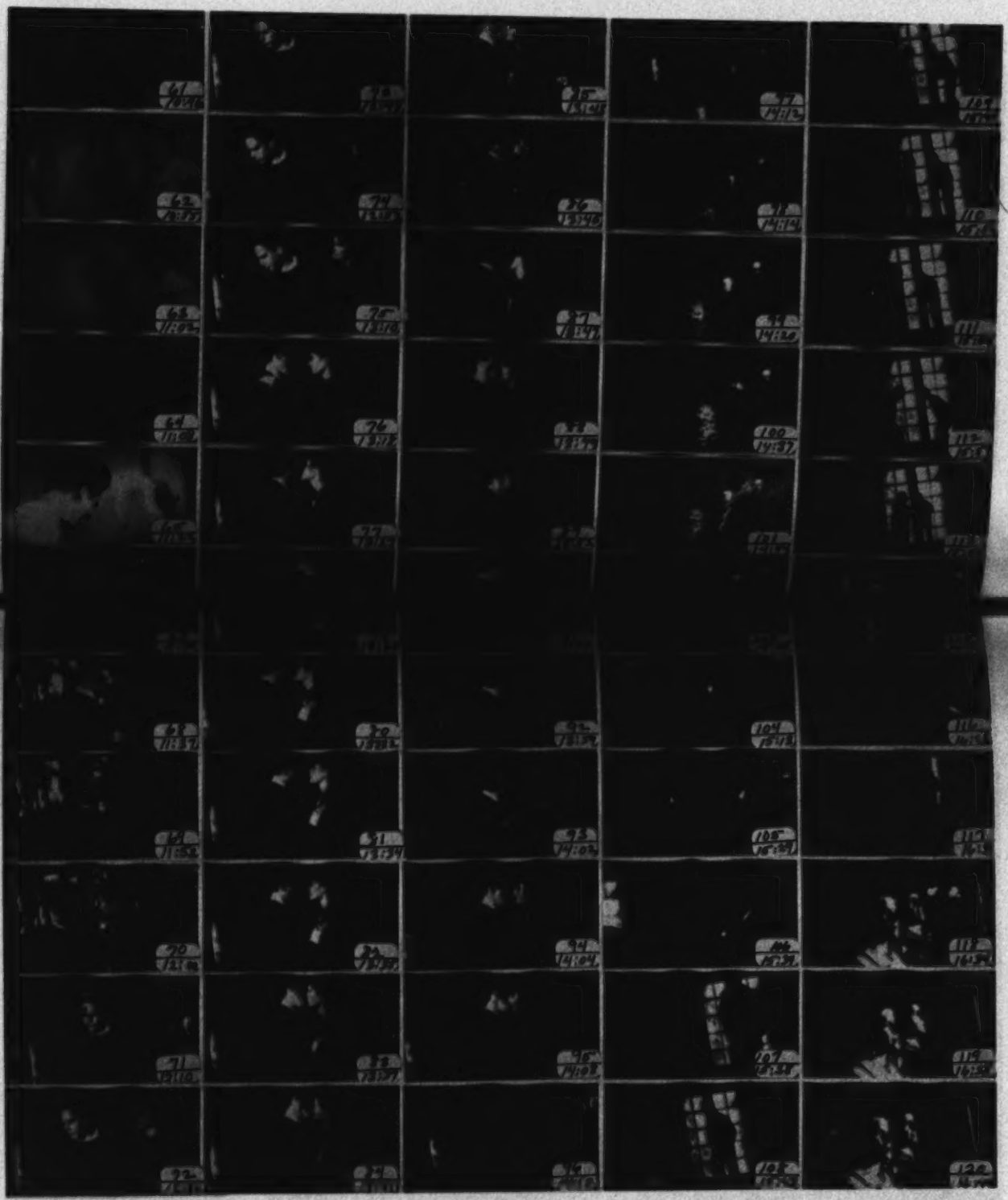
COPY BOUND CLOSE IN CENTER

-B-3-

Credits appear as Jonathan and Sandy discuss girls and sex (1 thru 22). Jonathan and Sandy meet Susan at college dance (23-44). Dorm room at night. Sandy and Jonathan discuss Susan (45-50). Sandy walks Susan home and they kiss (51-58). Jonathan urges Sandy to go "all the way" with Susan (59-60).

"CARNAL KNOWLEDGE"
Part 2 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)



-B-4-

-B-5-

Jonathan urges Sandy to go "all the way" with Susan (61-66). Sandy places his hand on Susan's breast. Susan places her hand in the area of Sandy's genital organ (67-97). Sandy demonstrates how Susan unzipped his fly and "did it", (98-113). Jonathan phones Susan for date (114-117). Jonathan dates Susan (118-120).

"CARNAL KNOWLEDGE"
Part 3 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

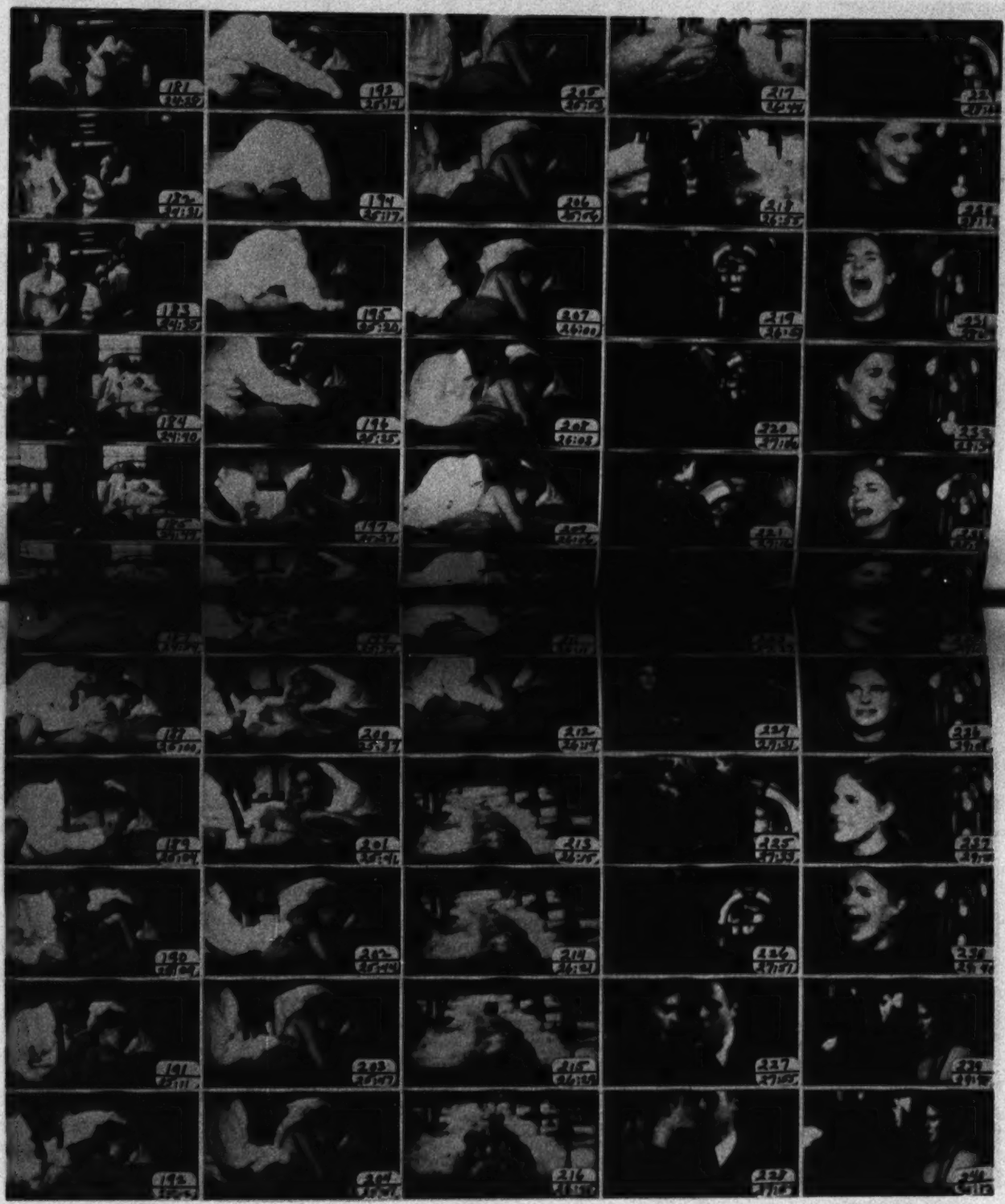
-B-6-

-B-7-

Jonathan dates Susan (121-129). Dorm at night. Sandy discusses Susan with Jonathan (131-139). Jonathan and Susan on date (140-141). Dorm at night. Jonathan tells Sandy of "Myrtle" (Susan) (142-150). Jonathan and Sandy have sexual intercourse on grass (151-175). Jonathan tells Sandy he "got laid". Sandy decides it's his turn (176-180).

"CARNAL KNOWLEDGE"
Part 4 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)



-B-8-

-B-9-

Sandy and Jonathan discuss Susan (181-183). Sandy and Susan have sexual intercourse in his dorm room (184-212). Sandy tells Jonathan he "got laid" by Susan (213-218). Jonathan and Sandy date Susan at dance (219-238). Jonathan and Susan talk (239-240).

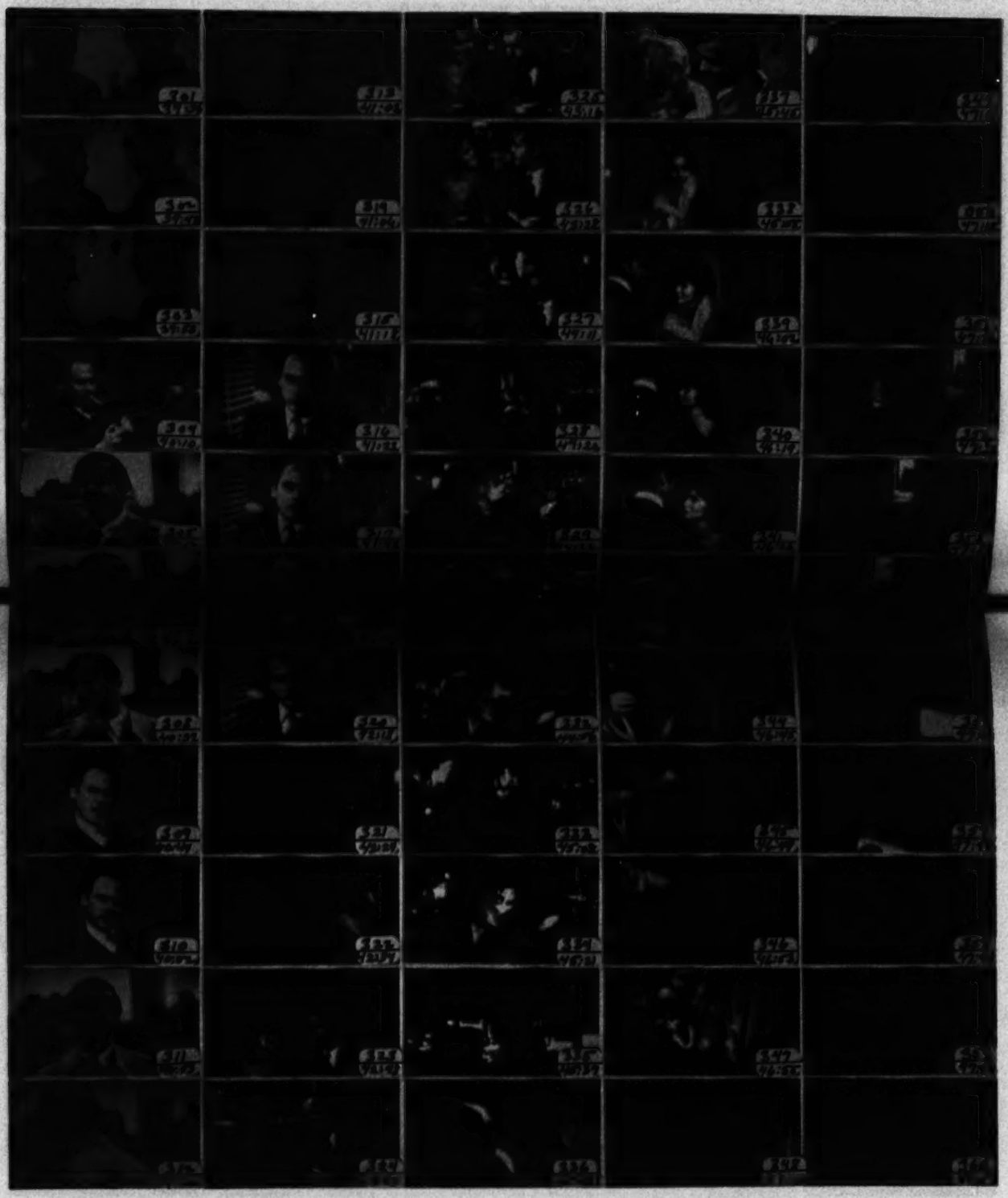
CARNAL KNOWLEDGE"
art 5 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Jonathan and Susan talk (241-246). Dorm at night. Sandy tells Jonathan his progress with Susan (247-248). Jonathan warns Susan to tell Sandy of their relationship (249-255). Jonathan phones Susan. They argue (256-275). Sandy and Susan pack for trip, as Jonathan watches (276-281). Time moves ahead to late 1950's. Jonathan and Sandy meet at skating rink. They discuss sex (282-300).

"CARNAL KNOWLEDGE"
Part 6 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (Julv 2, 1973)



Sandy and Jonathan discuss sex (301-320). Jonathan and Bobbi on date (321-335). They go to his apartment and engage in sexual intercourse (336-360).

"CARNAL KNOWLEDGE"
Part 7 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-14-

-B-15-

Intercourse scene continues (361-363). Bobbi lies on bed in the nude. Jonathan invites her to shower with him (364-376). Bobbi asks Jonathan to "shack up with her" (377-403). Sandy and Jonathan reminisce (404-415). Bobbi places her head between Jonathans legs as he reclines on bed (416-420).

"CARNAL KNOWLEDGE"
Part 8 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-16-

-B-17-

Bobbi gets up and prepares dinner and they talk (421-438). Sandy tells Jonathan of sex life with Susan (439-444). Jonathan and Sandy at tennis court play up to Cindy (445-457) Bobbi and Jonathan argue in his bedroom (458-480).

"CARNAL KNOWLEDGE"
Part 9 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

—B-18—

—B-19—

Bobbi fixes bra as a heated argument begins. Jonathan berates Bobbi (481-540).

"CARNAL KNOWLEDGE"
Part 10 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Jonathan's apartment. Jonathan and Sandy agree to swap (Bobbie for Cindy) (541-573). Jonathan makes advances to Cindy (574-600).

"CARNAL KNOWLEDGE"
Part 11 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Cindy tells Jonathan off (601-603). Bobbi attempts suicide (604-623). Time advances to late 1960's. Jonathan is showing Sandy and hippy girlfriend photo slides of his sex mates he has had (624-660).

"CARNAL KNOWLEDGE"
Part 12 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

-B-24-

-B-25-

Slide showing continues (661-671). Night scene. Jonathan and Sandy walk and talk (672-682). Jonathan's apartment. Prostitute Louise performs fellatio on Jonathan while talking to him, encouraging him (683-720).

"CARNAL KNOWLEDGE"
Part 13 of 13 Parts

Held to be in violation of Georgia Obscenity Statutes in Jenkins v. State of Georgia 230 Ga 726, 199 S.E.2d 183. (July 2, 1973)

Louise preparing to perform fellatio addresses her remarks to Jonathan's penis (722-749). Music comes in a skater is seen followed by film credits(750-756).

APPENDIX C

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WOODSON T. WOOD
COMMONWEALTH ATTORNEY
19TH JUDICIAL DISTRICT
MAYSVILLE, KENTUCKY

COUNTIES
MASON
FLEMING
BRACKEN

October 19, 1971

Mr. Charles H. Keating, Jr.
1811 Provident Tower
Cincinnati, Ohio 45202

Dear Mr. Keating:

Recently, after receiving several complaints, I called a special session of the Mason Grand Jury to view a film being shown at our local theatre titled "Carnal Knowledge". Although according to the standards which have prevailed in Mason County, this film would be obscene, unfortunately, it was only an "R" rated movie and had considerably more literary merit than the average "X" rated film. Nevertheless, the Grand Jury was so disgusted that they returned an indictment against the theatre chain and the manager for exhibiting an obscene movie.

As soon as the indictment was returned, the Court, at my request, ordered the film siezed for evidence, and is now in the hands of the Sheriff of Mason County. The attorneys for the theatre have requested that the film be returned, and that it be suppressed as evidence, and the Judge has directed that we file a memorandum, defendants to be filed on or before October 20, and ours to be filed within 25 days thereafter. I mention in passing that the circuit judge also viewed the film with the Grand Jury at the local theatre prior to the return of the indictment, and that the Grand Jury and all officers of the Court paid admission. It is my understanding that you are part of an organization that assists with the prosecution of this type of case. Accordingly, I would appreciate any advice which you might be able to furnish.

Yours truly,

Woodson T. Wood

Citizens for Decent Literature

DEDICATED TO DECENCY IN THE MASS MEDIA

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National Council of Women
Church of Jesus Christ of Latter Day Saints
Most Rev. Vincent S. Waters
Bishop of Raleigh, N. C.
Rt. Rev. Msgr. Nicholas H. Wegner
Director, Boys' Town, Nebraska

Reply To:
1811 Provident Tower
Cincinnati, OH 45202
October 30, 1971

The Honorable Woodson T. Wood
Commonwealth Attorney
19th Judicial District
Maysville, KY

Dear Mr. Wood:

In reply to your letter, I have instructed CDL attorneys Bertsch and Clancy to supply brief material or to write a brief, as you wish. Please call Dick Bertsch (216--696-1433) collect and give him as much detail as possible.

If you wish, I will appear as an expert witness.

We are also willing, at strategic points, to send CDL attorneys to you for direct assistance.

I am personally delighted you "hit" Carnal Knowledge. Our time is limited, but we will help.

Keep us posted and give us as much lead time as possible.

Sincerely,

CITIZENS for DECENT LITERATURE, Inc.

BY:_____

Charles H Keating, Jr.

ml
Enclosure--CHK Dissenting Report to
Presidential Commission

WOODSON T. WOOD
COMMONWEALTH ATTORNEY
19TH JUDICIAL DISTRICT
MAYSVILLE, KENTUCKY

March 7, 1973

Mr. Keating
Keating, Muething, & Klekamp
18th Floor, Provident Tower
Cincinnati, Ohio 45202

Re: Commonwealth Attorney, ex rel Woodson T. Wood, Prosecuting Attorney of Maysville, Kentucky
vs.
A Motion Picture "Carnal Knowledge", et al.

Dear Mr. Keating:

The above-styled action to abate "Carnal Knowledge" as a nuisance was filed in Mason Circuit Court as Civil Action No. 2917 on November 19, 1971. You will recall that there were several non-resident defendants, and we have thus far been unable to obtain service of process on any of the defendants except Countrywide Theatres, Inc., a New York corporation with registered process agent in Kentucky, and Kenneth Neal, Manager of the local theatre.

You will recall that I proceeded by criminal information against Countrywide Theatres, Inc. and Kenneth Neal under the Kentucky obscenity statute. I have agreed to accept a fine of $400.00 on a plea of nolo contendre to conclude the criminal matter.

Since the civil action was filed, Countrywide Theatres has ceased to lease the local theatre and the new lessee has not exhibited any undesirable films.

In view of the facts that the criminal matter is disposed of, that we have been unable to obtain personal jurisdiction of most of the civil defendants, that Mason Circuit Court has a local rule for dismissing civil actions in which no steps have been taken for six months, that Countrywide

is no longer operating in Mason County, and that "Carnal Knowledge" appears now to be a dead issue, we believe it would not be wise to push the civil proceedings further.

Counsel for the defense have been requesting me to voluntarily dismiss the civil action, and I am sure they will ask the Court to impose the local rule mentioned above sometime this month. However, in deference to your preparation of and interest in the suit initially, I have advised defense counsel that I would first request your consent to dismissal. Please advise as soon as possible.

Yours truly,

Woodson T. Wood

WTW:cb

APPENDIX D

Contract for special legal services entered into on Oct. 1, 1970, between Board of Commissioners of Fulton County, Georgia (Atlanta) and law firm of Keating, Clancy, Bertson and Johnston ..... Page 3-4

GEORGIA

FULTON COUNTY

WHEREAS, Fulton County has determined the necessity for conducting a program against the disseminators of obscenity in this county; and

WHEREAS, there is no person presently employed by Fulton County or associated therewith, who is technically trained and qualified by experience to undertake the work necessary to combat the wave of obscene materials confronting our youth; and

WHEREAS, the firm of Keating, Clancy, Bertsch and Johnston, 440 Leader Building, Cleveland, Ohio, is known to have on its staff qualified lawyers, experienced and capable of rendering service in a program by which cases for prosecution on charges involving pornography and obscene literature are to be prepared and presented;

NOW, THEREFORE, in consideration of the premises and of the benefits to the public, and to the welfare of citizens of Fulton County, it is agreed:

1.

The Firm will undertake the work of investigation, preparation and prosecution of cases dealing with pornography in Fulton County, under the general supervision of Mr. Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County.

2.

The Firm will be compensated at the rate of One thousand two hundred ($1,200.00) Dollars per month, at the end of each month; said services to continue for an indefinite period and until terminated by either party upon notice to the other.

3.

The Firm will not be entitled to any compensation or allowance as fringe benefit other than set forth herein.

4.

It is agreed that no member of the staff of Keating, Clancy, Bertsch and Johnston will have any civil service status, pension, or insurance benefits, or tenure of any kind as an officer or employee of the County.

IN WITNESS WHEREOF, the parties have hereunto set their hands and affixed their seals, this 1st day of October, 1970.

FULTON COUNTY

By: _____ (SEAL)
Chairman, Board of Commissioners

KEATING, CLANCY, BERTSCH AND JOHNSTON

By: _____ (SEAL)

APPROVED AS TO FORM:

_____
Fulton County Attorney

APPROVED AS TO CONTENT:

_____
Solicitor General,
Criminal Court of Fulton County

APPENDIX E

Page

Georgia Code Ann. Chapter 26-21.
Distributing Obscene Materials 3-6

years of age or older. No attempt has been made to change the former law with respect to liability of persons under the age of 14.

CHAPTER 26-21. DISTRIBUTING OBSCENE MATERIALS

Sec.
26-2101 Distributing obscene materials
26-2102 Distributing material depicting nudity or sexual conduct
26-2103 Use of premises in violation of Chapter
26-2104 Obscene materials declared contraband
26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions
26-2106 Severability provision

Cross-reference
Tax on obscene materials, See Chapter 92-21A.

26-2101 Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302; 1971, p. 344.)

Cross-reference
Distribution of obscene materials to minors, see §§ 26-9901a through 26-9907a. Cases decided under former law, see Appendix, §§ 26-6301, 26-6301.1.

Editorial Note
Op. Atty. Gen., 69-351, states that House Bill 61, 1969 session (Acts 1969, p. 222) defines new and separate offenses relative to making available to minors obscene materials and

neither repeals Ga. Code Ann., Ch. 26-21, Criminal Code of Georgia, as amended, nor amends Ga. Code Ann., Ch. 26-63 (1933) as amended. See § 26-9901a et seq.

Acts 1971, p. 344, added the proviso to subsection (a). The Act stated that "section 26-2601" was being amended, but they obviously intended to refer to this section.

ANNOTATIONS

Adversary hearing

There is no necessity for adversary hearing on question of obscenity of publications prior to institution of criminal action against distributor, where publications have been obtained by prosecuting officers by purchase and no seizure of publications is required for evidence. 266/471 (175 S. E. 2d 539).

Where judge signed ex-parte order requiring defendants to show cause before him at time ranging from one to three days thereafter why motion picture should not be declared obscene, defendants contended ex-parte order operated as prior restraint and hearing was not adversary in nature: Held: ex-parte orders issued did not operate as prior restraints on showing of films but were merely proper exercise by court of its power to preserve its jurisdiction over subject-matter of litigation until hearings could be had. 227/676 (182 S. E. 2d 464).

Trial judge's ruling that there is probable cause to believe motion picture "Sandra—The Making of a Woman" is obscene is amply supported by evidence. Procedure employed in adversary hearing, resulting in preliminary injunction against exhibiting film, was proper and violated no rights guaranteed appellants by First and 14th Amendments to Federal Constitution. 228 Ga. 102 (184 S. E. 2d 144).

Constitutionality

This section is not violative of First and Fourteenth Admendments of United States Constitution on ground of vagueness. 227/46, 47 (1) (178 S. E. 2d 894).

This section is not violative of First, Fourth, Fifth, Ninth and Fourteenth Amendments of United States Constitution on ground that constitutional right to mere possession of obscene material necessarily implies right to purchase such material and, hence, right of others, including appellant, to distribute it. Id. 47 (2).

This section prohibiting distribution of obscene materials held constitutional and within purview of First and Fourteenth Amendments to U. S. Constitution. 309 F. Supp. 998.

Evidence

Jury was correctly charged as to statutory definition of obscene material, as contained in § 26-2101 (b, c). Their finding, that material comes within such statutory definition, is authorized by evidence, which supports their verdict of guilty. 227/46, 47 (4) (178 S. E. 2d 894).

Magazine with 40 pages of photographs of various sex acts and eight pages of pornographic articles held obscene. 336 F. Supp. 1372.

Irreparable damage

Alleged violator of obscenity statutes was not entitled to have complaint considered on merits in action to enjoin State prosecutions and for declaratory judgment that laws were invalid in absence of allegations of bad faith or harassment or other irreparable damage. 439 F. (2d) 1406.

Motion pictures

Courts of this State are not estopped from finding film obscene because of holding by United States Court of Appeals, Second Circuit that same film is not obscene. 227/ 377 (188 S. E. 2d 712).

It is a crime to exhibit obscene film to public even though minors are not invited to view it. Id.

State has interest in welfare, peace, and good order of its citizens and communities, and may in proper case maintain action at instance of district attorney to enjoin existing or threatened nuisance, even though nuisance constitutes crime punishable under criminal laws. Id.

Pornography
Films involved in this case were hardcore pornography. Their commercial exhibition was not protected by first amendment, and trial court erred in refusing to enjoin their exhibition in theater where all adult persons willing to pay price were admitted. 228/343 (185 S. E. 2d 769).

26-2102 Distributing material depicting nudity or sexual conduct

(a) A person commits the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail, or otherwise unsolicited causes to be delivered, material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material, in not less than eight point boldface type, the following notice:

"Notice—The material contained herein depicts nudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but returned to the sender."

(b) As used within this section "nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state, and "sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast.

(c) A person convicted of distributing material depicting nudity or sexual conduct shall be punished by imprisonment for not less than one nor more than three years, or by a fine not to exceed $10,000, or both.

(Acts 1970, p. 173.)

26-2103 Use of premises in violation of Chapter

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

(Acts 1971, pp. 344, 345.)

26-2104 Obscene materials declared contraband.

Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.

(Acts 1971, pp. 344, 345.)

26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions

(a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

(Acts 1971, pp. 344, 345.)

26-2106 Severability provision

If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable.

(Acts 1971, pp. 344, 346.)

COMMITTEE NOTES

CHAPTER 26-21

DISTRIBUTING OBSCENE MATERIALS

Section 26-2101 is essentially a restatement of the former law, passed by the General Assembly in 1963 (Acts 1963, p. 78). The 1963 Act filled a void created by the judicially declared unconstitutionality of former § 26-6301 (Acts 1956, p. 801). The Act of 1956 attempted to eliminate coverage of radio, television, moving pictures, or newspapers published primarily for the distribution of public news from the sanctions imposed thereunder. Simpson v. State, 218 Ga. 337, 127 S. E. 2d 907 (1962).

Very little modification has been made in the Act of 1963 by the Criminal Code. Terminology has been simplified. The purpose of the Criminal Code is to punish the distribution or exhibition of obscene materials no matter who is the disseminator or exhibitor. Thus, any medium of distribution or exhibition is covered by this section. (Compare City of Atlanta et al. v. Twentieth-Century Fox Corporation, et al., 219 Ga. 271, 133 S. E. 2d 12 (1963).) The punishment has been retained with but some minor modification: rather than treating a first offense or subsequent offenses as misdemeanors in the discretion of the jury, the offense is, under the new section, a misdemeanor the first time it is committed and upon subsequent offenses it is treated as a felony. The punishment limits have been broadened to include a fine either in the alternative or in conjunction with the imprisonment.

CHAPTER 26-22. TREASON AND RELATED OFFENSES

Sec.

26-2201 Treason
26-2202 Insurrection
26-2203 Inciting to insurrection
26-2204 Advocating overthrow of government

APPENDIX F

CDL Model Obscenity Statute
(Revised 3-1-69)

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MODEL OBSCENITY STATUTE AND COMMENTS THEREON

Section 1. DEFINITIONS. As used in this Act:

(a) A thing is "obscene" if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of state public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated.

(b) "Prurient interest" is defined as a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for, or directed to a specially susceptible audience, the subject matter shall be judged with reference to such audience. For the purpose of Section 7 of this Act, when the subject matter is distributed or exhibited to minors under 18 years of age, the subject matter shall be judged with reference to an average person in the community of the actual age of the minor to whom such material is distributed, or exhibited. In all other cases, the subject matter shall be judged with reference to the average person in the community.

(c) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, play, night club performance, television production, or other pictorial representation, or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(d) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(e) "Distribute" means to transfer possession of, whether with or without consideration, by any means.

(f) "Knowingly" means having actual or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents, if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material, and the failure to inspect the contents is either for the purpose of avoiding such disclosure or is due to reckless conduct.

(l) "Reckless conduct" is conduct which consciously disregards a substantial and unjustifiable risk that matter may be obscene. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that an average law-abiding person would observe

in the actor's situation under like circumstances.

Section 2. AFFIRMATIVE DEFENSE. This Act shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise proscribed by this Act when such possession, distribution or conduct occurs in the course of law enforcement activities, or in the course of bona fide scientific, educational, or comparable research or study, or like circumstances of justification. If this issue is not presented by the prosecution's evidence, the defendant may raise the same as an affirmative defense by presenting some evidence thereon. Where raised, the prosecution must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue.

Section 3. JURY TRIAL. Criminal prosecutions and other proceedings involving the ultimate issue of obscenity (as distinguishe from the issue of "probable cause") shall be tried by jury, unless both parties to the action waive a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court.

Section 4. FUNCTION OF JURY AND COURT IN OBSCENITY TRIAL.

(a) The jury represents a cross section of the community and has a special aptitude for expressing the view of the average perso As the trier of fact, it is the exclusive judge of the common conscience of the community and the embodiment of community standards.

(b) Where a jury question is presented, i.e., that reasonable men may differ whether the subject matter or conduct is obscene, th trial court shall have no power either before, during, or after tri to dismiss an obscenity proceedings on the ground that the subject matter, or conduct, is not obscene as a matter of law; nor may an appellate court after trial set aside an obscenity verdict on the same grounds if an examination of the evidence indicates the verdic is supported by sufficient evidence.

(c) Any dismissal by the trial court on such grounds is appe able by the people.

Section 5. PRESUMPTION. Every person is presumed to have knowledge of the standards that exist in the community and what th jury or trier of fact may declare to be obscene.

Section 6. GENERAL SALE OR DISTRIBUTION, ETC., OF OBSCENE MA PENALTY. Every person who knowingly: sends or causes to be sent, brings or causes to be brought, into this State for sale or distri tion or exhibition; or in this State either (1) prepares, publishes prints, exhibits, distributes, or offers to distribute; or (2) has in his possession with intent to distribute or to exhibit or offer to distribute; any obscene matter is guilty of a misdemeanor.

Section 7. DISTRIBUTION OF OBSCENE MATTER TO MINOR; PENALTY. Every person, who with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he

should reasonably know that such person is a minor under 18 years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter to a minor under 18 years of age, is guilty of a misdemeanor.

Section 8. HIRING, EMPLOYING, ETC., MINOR TO ENGAGE IN ACTS DESCRIBED IN SECTION 4; PENALTY. Every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Sections 6 or 7, is guilty of a misdemeanor.

Section 9. ADVERTISEMENT, PROMOTION OF SALE, ETC., OF MATTER REPRESENTED TO BE OBSCENE; PENALTY. Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material for, or who otherwise advertises or promotes the sale, distribution, or exhibition of matter represented or held out by him to be obscene, whether or not such matter exists in fact, or is obscene, is guilty of a misdemeanor.

Section 10. PARTICIPATION IN LEWD EXPOSURE OR SIMULATED ACTS OF SEXUAL INTERCOURSE OR PERVERSION AS A PART OF A PLAY, ETC.

(a) Every person who, during the course of a play, night club act, motion picture, television production, or other exhibition, or mechanical reproduction of human conduct, engages in any lewd exposure or simulated act of sexual intercourse or perversion, which if engaged in offstage or offscreen and in public, would be subject to prosecution under Section ____ of the Penal Code as the misdemeanor crime of lewd exposure or exhibition, or under Section ___ of the Penal Code as the felonious crime against nature, or under Section ___ of the Penal Code as the felonious crime of sexual perversion, is guilty of a misdemeanor.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct is guilty of a misdemeanor.

Section 11. SINGING OBSCENE SONG, BALLAD, ETC.; PENALTY.

(a) Every person who sings or speaks any obscene song, ballad, or other words in any play, night club act, motion picture, television production, or other exhibition or medium reproducing human conduct, or in any public place, is guilty of a misdemeanor.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production, or other mechanical reproduction containing such conduct, is guilty of a misdemeanor.

Section 12. REQUIRING PURCHASER OR CONSIGNEE TO RECEIVE OBSCENE MATTER AS CONDITION TO SALE, ETC.; PENALTY. Every person, who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is guilty of a misdemeanor.

Section 13. CONSPIRACY. A conspiracy of two or more persons to commit any of the crimes proscribed by this Act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy.

Section 14. SPECIAL VERDICT. At the trial of any action arising hereunder, the jury shall render a special verdict, or, if jury trial be waived, the court shall enter special findings, on the issue of obscenity, in addition to a general verdict or general findings. The special verdict or findings on the issue of obscenity shall be: "We find (the court finds) the _____ (title or description of matter) to be obscene," or, "We find (the court finds) the _____ (title or description of matter) not to be obscene," as each item is or is not found obscene. A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding.

Section 15. PUNISHMENT.

(a) Every person who violates Sections 6 or 9 is punishable by a fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this Act, a violation of Section 6 or Section 9 is punishable as a felony and by a fine of not more than two thousand dollars ($2,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed twenty-five thousand dollars ($25,000) or by imprisonment in the State prison for not exceeding five years or by both such fine and such imprisonment.

(b) Every person who violates Sections 7, 8, 10, 11, or 12, is punishable by a fine of not more than two thousand dollars ($2,000) or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If such person has been previously convicted of a violation of this Act, a violation of Sections 7, 8, 10, 11, or 12, is punishable as a felony and by a fine

of not more than five thousand dollars ($5,000), or by imprisonment in the State prison not exceeding five years, or by both such fine and imprisonment.

(c) Every person who violates Section 13 is punishable by a fine of not more than five thousand dollars ($5,000), or by imprisonment in the State prison not exceeding five years, or by both such fine and imprisonment.

Section 16. SEIZURE OF OBSCENE MATTER AUTHORIZED. Every person who is authorized to arrest any person for a violation of this Act is equally authorized to seize any obscene matter found in the possession or under the control of the person so arrested and to deliver the same to the court before whom the person so arrested is required to be taken.

Section 17. PROBABLE CAUSE FOR SEIZURE TO BE SUMMARILY DETERMINED.

(a) If the seizure be controverted by any interested person, the court to whom any obscene matter is delivered pursuant to the foregoing section or to the return of a search warrant must within one day after service upon the prosecuting attorney of a motion to suppress the evidence and/or restore the matter, proceed to take testimony in relation thereto. A decision as to whether there is probable cause to believe the seized material to be obscene shall be rendered by the court within two days of the conclusion of the restoration proceedings.

(b) If the motion to suppress the evidence is granted on the grounds of an unlawful seizure, the property shall be restored unless it is subject to confiscation as contraband, as provided for in Section 18, in which case it shall not be returned.

Section 18. CONTRABAND. DESTRUCTION OF OBSCENE MATTER OR ADVERTISEMENT OF MATTER REPRESENTED TO BE OBSCENE.

(a) Obscene matter and advertisements for matter represented to be obscene are contraband and shall be destroyed.

(b) Upon the conviction of the accused or rendition of a court order declaring such matter to be contraband and subject to confiscation, the court shall, when such judgments become final, order, upon five days' notice to the defendant, any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the District Attorney or any law enforcement agency, to be destroyed, and the court shall cause to be destroyed any such material in its possession or under its control, retaining only such copies as are necessary for law enforcement purposes.

Section 19. PREPARING, ETC., OBSCENE MATTER OR ADVERTISING ELSEWHERE FOR SALE OR DISTRIBUTION IN THIS STATE. EXTRADITION. Every person, whether or not he is a citizen of or present in this

State, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this State, or who knowingly sends or causes to be sent, or brings or causes to be brought by any means into this State for sale or distribution herein, any obscene matter or any advertising promoting the sale or distribution of matter represented or held out to be obscene, whether or not such matter exists in fact or is obscene, shall be subject to the penalties of this Act, and the executive authority of this State shall demand extradition of such person from the executive authority of the State in which such person is found.

Section 20. POLICY. The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys (or sheriffs, police chiefs, district attorneys, city attorneys, city prosecutors, and all law enforcement officials) shall vigorously enforce these sections within their respective jurisdictions.

Section 21. POLICY (LOCAL CONTROL). It is not the intent of this Act to occupy the field in the regulation of obscenity, and counties, cities and other political subdivisions of this State are hereby specifically given the right to further regulate obscene materials and conduct.

Section 22. SEVERABILITY. If any provision hereof or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

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APPENDIX G

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Comments on Model Obscenity Statute
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COMMENTS ON THE MODEL OBSCENITY STATUTE

The CDL model statute is patterned after the American Law Institute Model Penal Code drafts. Both employ the "variable" approach to obscenity. Several state legislatures have already adopted this "variable" approach to obscenity. See South Dakota Section Laws of 1968, Chapter 29, Sections 1-16, approved February 15, 1968; New York Penal Laws, Article 235.00-235.22, effective September 1, 1967; Illinois Annotated Statutes, Smith-Hurd, Vol. 28, Sections 11-20; General Statutes of North Carolina, Volume 1-B, Section 14-189.1, and an Act of the South Carolina General Assembly, approved May 12, 1965. Other states have partially adopted its tenets by judicial interpretation: Conn. v. Sul, 146 Conn. 78, 147 At1.2d 686, 691 (1958); State v. Jackson, 224 Or. 337, 356 P2d 495, 507 (1960). The United States Supreme Court has, in its majority opinions, repeatedly cited the Model Penal Code provisions with approval. See "Analysis of the Mishkin, Ginzburg, and Fanny Hill decisions", appearing in the National Decency Reporter, June-July 1966, at page 15, and CDL Commentaries on the Law of Obscenity, Volume 1, No. 3, pp. 2-15, and Sam Ginsberg v. N.Y., 20 L.Ed.2d 195 at fn. 4 (April 22, 1968).

Public Nuisance - Section 1(a)

Section 1(a) incorporates into statutory language the Common law concept that obscenity is a public nuisance. The merit to this approach lies in the resultant focusing on the public welfare issue and muting of the defense cry of "censorship".

In December of 1968, the District Attorney of Allegheny County (Pittsburgh, Pa.) utilized this concept in a successful Common Law action in equity to abate the motion picture film, "Theresa and Isabella" as a public nuisance. Comm. of Penn. v. Guild Theater. Similar actions have also been successful elsewhere.

"Utterly without redeeming social importance - Section 1(a)

The majority opinion in Roth-Alberts is clear that "utterly without redeeming social importance" is not a required test for factual obscenity. If it were, the judge in Roth v. U. S. would have been required to instruct the jury in that case to make a finding on that issue.

At page 484 of the Roth-Alberts opinion, Justice Brennan said, "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." It seems clear from this language that the two terms are equivalent. Section 1(a) of the Model Obscenity Statute incorporates this understanding.

At least two State Supreme Courts have recently refused to follow the current bastardization of the Roth test which attempts to engraph "utterly without redeeming social importance" onto the Roth test as a third and separate test. Cain v. Comm. of Ky., Ky. ___ (Feb. 14, 1969), City of Blue Island, Ill. v. DeVilbiss, 242 N.E.2d 761 (Nov. 22, 1968).

Variable Obscenity: The Development of Its Acceptance in the United States Supreme Court

The philosophy behind the model legislation first appeared in the language of the modern Court's opinions in 1957 in the concurring opinion of Chief Justice Warren in Roth v. U.S., where he said:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." Roth v. U.S., 354 U.S. 476, at 494. See also, Justice Warren's opinion in Kingsley Books, Inc. v. Brown, 354 U.S. 436, and Jacobellis v. Ohio, 378 U.S. 184 (1964).

An examination of the variable treatment afforded the subject matter emphasizes that it is the "act", not the subject matter which is important.

Nine years later, a majority of five justices adopted Warren's rationale in the Roth case and, in upholding variable obscenity as consistent with constitutional standards, applied its rationale in interpreting the federal postal obscenity statute. Ginzburg v. U.S., 383 U.S. 463, 475 (Mar. 21, 1966). Justice Harlan would have made it a majority of six, had the Ginzburg case not been a federal prosecution.

The "special audience" concept - that portion reading, "If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for, or directed to a specially susceptible audience, the subject matter shall be judged with reference to such audience" - was given the approval of six justices in Mishkin v. U.S., 383 U.S. 502, dealing with bondage and flagellation materials and decided on the same day as Ginburg v. U.S., supra.

The minor's concept - that portion reading, "When the subject matter is distributed or exhibited to minors under 18 years of age,

the subject matter shall be judged with reference to an average person in the community of the actual age of the minor to whom such material is distributed or exhibited," as construed by the New York Court of Appeals in Bookcase v. Broderick, 18 N.Y.2d 71, (July 7, 1966) and People v. Tannenbaum, 18 N.Y.2d 268 - was upheld by a majority of five members in Sam Ginsberg v. U.S., ___ U.S. ___, 20 L.Ed.2d 195 (April 22, 1968).

Variable Obscenity: How It Functions

Under the "variable" obscenity approach, the term "obscene" as defined in Roth-Alberts functions in accordance with two variable factors: (1) The nature of the materials, and (2) the use of the materials, i.e., the manner in which they are employed.

Under "variable" obscenity, the most objectionable material imaginable (Variable Factor 1) would not be obscene when used by a proper audience (Variable Factor 2). See U.S. v. 31 Photographs, 156 F.Supp. 350 (DCSD NY 1957), cited for comparison in Ginzburg at page 40, fn. 15, involving the use by Kinsen scientists for research of what was conceded to be blatant pornography. Conversely, material of a less objectionable nature (Variable Factor 1) may be obscene when used improperly, i.e., for the sole purpose of pandering to the prurient interest (Variable Factor 2). See U.S. v. Rebhuhn, 109 F.2d 512 (2d Circuit 1940), cited with approval in Ginzburg at page 39 and page 40, fn. 15, where a book, "Sex Life In England" having a limited legitimate audience of anthropologists and psychotherapists was indiscriminately advertised and disseminated in the mail.

The above results are not startling, nor are they inconsistent with the majority decision in Roth. Quite the contrary, they draw into focus and clarify the Roth concepts which reject obscenity as "utterly without redeeming social importance" and equate obscenity with "pandering" to the prurient interest. In the former situation, the use of the material under the circumstances establishes the material as having "redeeming social importance", whereas in the latter situation, the "pandering" use establishes the material as "utterly without redeeming social importance." Pandering was defined by the Court in Ginzburg at page 36 as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

Variable Obscenity: Proof

Such evidence may come from either the prosecution or the defense, depending upon who has the burden of going forward with the evidence, and bearing in mind that it is always the prosecutor's burden to establish the violation beyond a reasonable doubt. See Section 2 of the CDL Model Obscenity Statute entitled, "Affirmative Defense". This was graphically illustrated in the majority opinions in the Mishkin and Ginzburg cases.

In the "Housewife's Handbook on Selective Promiscuity" counts in Ginzburg, the United States Government, during its case in chief, presented evidence tending to establish indiscriminate mailings and Ginzburg's intent to pander. Such was sufficient to support the trial court judgment. Had Ginzburg wished to rely on the book's nonprurient appeal in the hands of a special audience of doctors, etc., it was his burden to introduce some evidence in order to overcome the people's prima facie case. Cf. U.S. v. 31 Photographs, etc., 156 F.Supp. 350, cited with approval in Ginzburg at fn. 15, where the trial judge acquitted members of the special audience when the purpose of the distribution was shown to be the social value rather than the prurient interest to the special audience of sociologists.

In Mishkin v. N.Y., the people introduced proof of the appeal of the material to a special audience during their case in chief, which supported the judgment on appeal.

Variable Obscenity: Sales to Minors

(a) Historical Background of the Term "Obscene to Minors".

Under the American Law Institute Model Penal Code Statute and Section 7 of the CDL Model Obscenity Statute, when a person makes a sale to a minor, knowing the purchaser to be a minor, or while in possession of such facts that he should reasonably know that such a person is a minor, then the obscenity is judged by the response of such minor to that material. The Reporter's Comments to American Law Institute Model Penal Code Section 207.10, at pages 36-38, provide:

> 9. Obscenity Judge by Ordinary Adults. Unless Addressed to Special Audience. A fundamental question in current obscenity law is whether obscenity is to be measured by the response of average or normal individuals or by that of any child or perverted adult to whose notice the material may come . . . .
>
> Subsection (a) of proposed Section 207.10 requires obscenity to be judged with reference to ordinary adults unless the material is designed for or directed to children or other specially susceptible audience . . . . (Our emphasis.)

Support authority for this proposition is U.S. v. Levine, 83 F. 156 (1936), and the opinion of the Circuit Court of Appeals, Second Circuit, written by Judge Learned Hand. Judge Learned Hand was one of the drafters of the Model Penal Code sections on Obscenity. The case dealt with a federal prosecution for sending an obscene circular through the mails. At page 157, Judge Hand said:

"What counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus, 'obscenity' is a function of many variables.

"The case was not tried on this theory; on the contrary the judge supposed that a book or picture was obscene of innocent by an absolute standard independent of its readers . . . . He was in error . . . ." (Our emphasis.)

And at page 158:

"It may appear that the prospective buyer in the eighth count was a youth and that the accused had reason to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader. It is when the crime consists of importing the work, or offering it for general sale, that the test cannot be found in the interests of those to whom it is sent, though abnormally susceptible . . . ."

U.S. v. Levine was cited in the Roth case with approval at fn. 16 as an example of the modern test. See also its citation in Sam Ginsberg v. N.Y., 20 L.Ed.2d 195 at page 202, fn. 5.

Variable Obscenity: Sales to Minors
(b) "Harmful to Minors", as Used in Sam Ginsberg, Means "Obscene to Minors"

When Sam Ginsberg v. New York was handed down April 22, 1968, a blind legislative stampede was started in other states to incorporate into law the provisions of the Special New York Minor's Statute at issue in the Sam Ginsberg appeal. In our opinion a blind application of the language of that statute without more is unwise. If Sam Ginsberg is to be properly understood, one must consider the history of the New York statute and the results reached in the New York cases which tested the constitutionality of that provision.

The New York statute is not really a "Special Minor's Statute". It is a specific application of the variable obscenity concept as applied to distributions or exhibitions to minors. In reacting to the hard-core pornography rule (constant obscenity) which had evolved in the New York courts, the New York State Legislature in 1965 adopted two minor's statutes, Penal Law Sections 484(h) and 484(i). Although the drafters of those statutes employed the special language, "harmful to minors", the New York Court of Appeal

in upholding the constitutionality of such provision, construed the term to mean "obscene to minors". See People v. Charles Tannenbaum, 18 N.Y.2d 268, 274 N.Y.S.2d 131, wherein the New York Court of Appeals said:

> "In response to the deeply felt needs of the community, our State Legislature enacted . . . statutes . . . proscribing dissemination to infants under 17 . . . of materials obscene as to such infants. (Our emphasis.)
>
> "In Bookcase v. Broderick, 18 N.Y.2d 71, decided July 7, 1966, we upheld the Legislature's power to employ variable concepts of obscenity." (Our emphasis.)

It was this statute and this interpretation which was upheld by the United States Supreme Court in Sam Ginsberg v. N.Y., 20 L.Ed.2d 195 at 206.

If the law of obscenity is to remain coherent and intelligible, the language employed in the statute must remain rooted to establish historical concept. To illustrate, we need but cite two proposed adaptations of the "harmful to minors" statute. One proposed in Ohio created three crimes: "Obscene to adults," "harmful to minors", and "obscene to minors". To further complicate matters, in the case of the latter two crimes, different penalties were established for each crime. Another proposal in California defined "harmful matter to minors" to mean "that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter the redeeming social importance of which is substantially less than its prurient appeal." (Our emphasis.) The unsoundness of the latter language stems from the fact that as originally employed in Roth, it was held that a prurient interest was "utterly without redeeming social importance". The latter definition of "prurient interest" would contradict the Roth holding.

The CDL Model Obscenity Statute adopts the "obscene to minors" approach used in the American Law Institute Model Penal Code, which represents the distillation of the best of this Nation's obscenity laws, which laws were arrived at by such experienced jurists as Justices Learned Hand, Jerome, Frank, and Curtis Bok, etc.

The proscription of Section 7 only applies to distributions and exhibitions and not to "possession for sale", since possession of such material (i.e., obscene to minors under 18 but not to persons over 18) would be legal for sale to those over 18.

Under Section 7, knowledge of the minor's age is an element of the CDL Minor's Statute. See Sam Ginsberg v. N.Y., 20 L.Ed.2d 195.

206. It is doubtful that an absolute liability standard will succeed. See Commonwealth of Mass. v. Corey, 221 N.E.2d 222 (Nov. 3, 1966) involving the sale of the paperback book "Candy" to minors aged 15 and 17, and cf. New York Penal Law 484 (i), which required knowledge of the character of the material, but unlike Section 7 of the CDL Model Obscenity Statute and unlike Section 484 (h), did not require knowledge of the minor's age. New York Penal Code Law 484(i) was involved in N. Y. v. Tannenbaum, 18 N.Y.2d 268, 274 N.Y.S.2d 131, held to be moot in 18 L.Ed.2d 1300, and was held to be unconstitutionally vague in Rabeck v. N.Y., ___ U.S. ___, 20 L.Ed.2d 741, 88 Sup. Ct. ___ (May 27, 1968).

Variable Obscenity: Special Audience - Bondage, Flagellation, and Homosexual Material

The "special audience" proviso in the definition of obscenity is designed to take care of the bondage, flagellation, and homosexual problem.

In this case, prosecution would be brought under the general obscenity proscription. See Section 6. The people in their case in chief, can show by expert testimony that the material had a prurient effect on the special audience, and by testimony of vice officers and other experts that it was aimed at a special audience. See American Law Institute Model Penal Code (1957 draft), Section 207.10(2) and the Reporter's Comments thereon at pages 36-38; Proposed Official Draft, Model Penal Code (1962), and U.S. v. Levine, 83 F.2d 156. See also Harold Zucker v. N.Y., 15 A.D.2d 883, 225 N.Y.S.2d 154 (Mar. 6, 1962), cert. denied 371 U.S. 863, 83 S. Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962); Louis Finkelstein v. N.Y., 11 N.Y.2d 300, 229 N.Y.S.2d 367, 183 N.E.2d 661 (May 17, 1962), cert. denied 371 U.S. 863, 83 S. Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962); Edward Mishkin v. N.Y., 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (Mar. 21, 1966).

Scienter - Sections 1(f) and (2)

The scienter requirement came into the law through Justice Brennan's opinion in Smith v. Calif., 361 U.S. 147 (1959). That case held a strict liability penal ordinance to impose too severe a limitation on the public's access to constitutionally protected matter. The dictum in the Smith case seemed to establish, and most state courts so interpreted, the mens rea constitutional requirement as "an awareness of the nature of the contents". A complete discussion of the cases decided after Smith appeared in CDL Commentaries On the Law of Obscenity, Volume 1, No. 1, at pp. 53-95. See also Ginsberg v. N.Y., 20 L.Ed.2d 195 at 206.

In Mishkin v. N.Y. (supra), an argument was made that the state had the burden of proving that the defendant had "subjective" knowledge that the subject matter was obscene. A majority of six rejected this argument, holding that the New York statutory requirement, as

interpreted by New York's highest court, was equivalent to the "reckless" standard of the Model Penal Code test, which satisfied the constitutional standard. Approval of the "reckless" test - an objective standard - put to rest the argument that "subjective" knowledge was a constitutional requirement. See National Decency Reporter, June-July 1966, p. 9, et seq.; CDL Commentaries on the Law of Obscenity, Volume 1, No. 3, pp. 2-9, et seq.

The definition of "knowingly" under Section 1(f) of the CDL Model Obscenity Statute is aimed at keeping the prosecutor's burden of proof for a prima facie case at "knowledge of the contents".

The use of the affirmative defense will permit a defendant latitude in establishing, in his defense, that he was trading in the materials legitimately (i.e., was not pandering), once the prosecution has established that he knew or should have known of the contents.

Presumption - Section 5

The presumption in aid of the people's case, established by Section 5, is merely a restatement of the language of the United States Supreme Court in Roth-Alberts at fn. 28.

Jury Trial - Sections 3 and 4

Historically, the test for obscenity has been defined in terms of a jury question. See Judge Learned Hand's opinion in U. S. v. Levine, 83 F.2d 156, 157:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values is incommensurable. We impose such a duty upon a jury . . . because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community . . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standaad of care." (Our emphasis.)

Some states guarantee the right of jury trial to both the people and the defendant. See Wisc. Statutes, Vol. 42, Section 957.01; Calif. Const. Art. 1, Sec. 7. In such a situation, the people are not deprived of a jury trial on the issue of "obscenity" where the defendant waives jury trial, unless the people join in the waiver. See 79 A.L.R. 563.

In other states, because of special statutes, the people do not have such a right in situations where the defendant waives jury. See State of Ohio v. Winters, 410 App. 146, 12 O.L.Abs. 164, 180 N.E. 559, where the court held it to be error to grant the state's request for a jury trial where the defendant had waived his right to jury trial.

Section 3, in requiring a jury trial unless waived by both parties, focuses attention on the special interest of the people in the value being determined - the common conscience of the community. Section 4 condifies the Common Law concept that the jury is the embodiment of community standards.

Recent cases which faithfully apply this principle are: Bissinoff v. Harper, 212 So.2d 666 (July 11, 1968), and Cain v. Comm. of Ky., ___ Ky. ____ (Feb. 14, 1969), where the Kentucky Court of Appeals said:

> "As we view this matter, it is not the function of this court or any other appellate court to determine whether the material shown is obscene. This is a factual determination to be made by a jury. The film was shown to the jury and they found it obscene. Our function as an appellate court is limited to determining whether the evidence in the record supports the findings of the jury. If so, the verdict must stand. This law is so basic and ancient to the principles of English and American jurisprudence as so elementary in its application as a principle of appellate procedure that we do not feel called upon to cite authorities for its support . . . ."

Because of the possible conflict with free speech, the determination of obscenity is often termed a mixed question of law and fact. For the proper functioning of the court and jury in this area, see the comment in CDL Commentaries on the Law of Obscenity, Volume 1, No. 3, at pp. 3-32, et seq., entitled, "Both The Court and The Jury Have a Proper Function."

Appeal on Matters of Law - Section 4(c)

Section 4(c) authorizes an appeal by the prosecution in cases where a lower court holds that the subject matter, which is the subject of the charge, is constitutionally protected. This follows the recommendations contained in Section 207.10(3) of the 1957 draft of the Model Penal Code. While in many jurisdictions this right of appeal exists at the present time, in at least one major jurisdiction, the district attorney has refused to appeal, under the claim that, procedurally, the avenue is not open to him.

Advertising Material To Be Obscene - Section 9

Section 9 makes it a misdemeanor to represent or hold out matter to be obscene, whether or not such matter is in fact obscene. This follows the recommendation of Section 207.10(6) of the 1957 Model Penal Code draft and Section 251.4(2)(a) of the Model Penal Code (1962).

The roots for the Model Penal Code proposal are found in principles expressed in several old federal cases which gained acceptance in the 3rd Circuit in the so-called Hornick rule. U.S. v. Hornick, 229 F.2d 120 (3rd Cir. 1956). An excellent discussion of this development appears in James Jackson Kilpatrick's book, "The Smut Peddlers" at pp. 71-77.

A similar provision appearing in California Penal Code Section 311.5 was tested and upheld as constitutional in Kirby v. Municipal Court of Newhall Judicial District, 46 Cal. Rptr. 844 (Sept. 30, 19

Lewd Exposures, Etc., As A Part Of A Play, Etc., - Sections 10 And 11

The communcations media is plagued at the present time with an avalanche of lewd displays and language which, if engaged in off stage or off screen and in public, would be subject to criminal penalties as improper public conduct. Sections 10 and 11 codify the rationale applied by the majority of the New York Court of Appeals in Trans Lux Distributing Corp., v. Board of Regents, 248 N.Y.S.2d 857 (Mar. 26, 1964), reversed on other grounds in Trans Lux Distributing Corp. v. Board of Regents, 380 U.S. 259 (Mar. 15, 1965). See also Justice Clark concurring in Kingsley International Pictures Corp. v. Regent, 360 U.S. 684 at 702.

It beggars logic to say that acts of sodomy or actual perversion are punishable as felonies and at the same time hold that a vivid full screen four minute pictorial display of a simulated act of oral intercourse (sodomy) performed by one teenage girl on another teenage girl ("Theresa and Isabella") or a full screened five minute pictorial display of a like lesbianic act ("The Killing of Sister George"), or similar screened conduct or play performance may not be reached by the law. As was voiced by Justice Burke in the Trans Lux case at page 861:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays."

These recent developments should even give Justices Douglas and

ck second thoughts. See Justice Douglas dissenting in
h at page 512:

"I assume there is nothing in the Constitution which permits Congress from using its power over the mails to proscribe conduct on the ground of good morals. No one would suggest that the First Amendment permits udity in public places, adultery, and other phases of sexual misconduct. . . ." (Our emphasis.)

Felony vs. Misdemeanor - Sections 14 and 15

Section 13 makes a conspiracy to violate the obscenity laws elony.

While the initial violation of Sections 6, 7, 8, 9, 10, 11 12 is a misdemeanor, under the provisions of Section 15, a second olation is treated as a felony.

Special Verdict In Criminal Trial
On Issue of Obscenity - Section 14

The procedure should be such as to permit the "obscenity" of subject matter involved in the case to be decisively decided. is may not be done in three situations:

1. Where there are multiple items involved in one count, e.g., one count charging possession of five publications, and the jury returns a general "guilty" verdict. Under such a verdict, the jury may have considered only one, or all five obscene.

2. Where the jury returns a general verdict of "not guilty" solely because they could not find the defendant had the requisite guilty mind - "scienter".

3. Where a search and seizure ruling makes prosecution of the criminal case impossible.

At the present time, it is essential that law enforcement be e to point with certainty to that specific material which was nd to be obscene as a level of reference and guide for future ion. If it is a girlie magazine, the name and number of the ition should be identifiable as the item which was declared to obscene, so that the community evaluation may be known and erstood by law enforcement officials in the same and other isdictions, and considered by them as a guide in their future ions.

There are many situations where a jury may be convinced that material is obscene but will not convict, because of the other

considerations involved in a criminal trial - the guilty mind (scienter) requirement. Examples are: The vendor who agrees to remove the material after arrest, but who is prosecuted anyway; the situation where a vendor is prosecuted for material which is similar to equally obnoxious material sold elsewhere; prosecution of the "little old lady" who is able to convince the jury she had not been adequately warned, etc.

The above defects may be corrected by the addition of a provision which requires the return of a special verdict on the issue of "obscenity" in addition to the return of the general verdict.

In praise of special verdicts, Sunderland says in 29 Yale L. J. 253, 259:

> "The special verdict compels detailed consideration, but above all it enables the public, the parties and the court to see what the jury has done . . . . The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved . . . ."

The special verdict of Section 14 has been made inadmissible as evidence in other proceedings, in recognition of the fact that "use" is a variable factor under variable obscenity concepts (supra). The "conduct" is not always the same in every case, hence the findings shall be restricted to the conduct involved in the case which was tried. See National Decency Reporter, June - July, 1966, at page 7, para. 5.

Penalty - Section 15

The graduated penalty of Section 15 is specifically aimed at the manufacturer and distributor. The small retailer does not suffer as much as the area distributor. Any large scale distributor will distribute as many as 2,000 copies of a salacious paperback book. Under intelligent use of this penalty provision, a penalty of major proportions (up to $10,000) can be imposed upon the really culpable operator. This section is modeled after Section 311.9 of the California Penal Code.

Seizure and Summary Determination - Sections 16 and 17

Section 16 specifically authorizes the arresting officer, at the time of an arrest, to seize material reasonably thought by him

to be obscene. Section 17 establishes procedures which provide the due process safeguards required in such cases by Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (June 24, 1957), and Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965).

Both provisions are necessary to counter the claim being made by defense attorneys that arresting officers have no right to seize without a prior judicial determination. See Flack v. Municipal Court of Anaheim-Fullerton Judicial District, 56 Cal. Rptr. 162, 165 (Jan. 20, 1967), where the California Court of Appeal, Fourth District, rejected such claim, saying:

> "No citation of authority seems necessary for the proposition that probable cause need not be previously determined in each instance by a judicial officer before a police officer can make a lawful arrest accompanied by seizure for that which would appear to 'the reasonable man' to be a crime involving contraband. Police officers cannot be relegated to a classification wherein their judgment would not meet the test enunciated in Roth v. United States . . . ."

A majority of the ultra-liberal California Supreme Court had a different view however. See Flack v. Municipal Court, 59 Cal. Rptr. 872 (July 3, 1967) reversing the Court of Appeal.

Nor did Philadelphia County law enforcement officers fare any better in the Pennsylvania courts, in a case involving an arrest and the seizure of the motion picture film, "Olga's House of Shame". Smith v. Crumlish, 218 Atl.2d 596 (Apr. 14, 1966). In returning the film, Common Pleas Judge Chudoff said that Sections 528 and 529 of the Pennsylvania laws "do not provide any special procedure for the search and seizure of the films." He said he was leaving the solution of the problem to the State Legislature.

Recently the federal courts have intruded upon the scene with startling results. In Cambist Films, Inc. v. Illinois, 292 F.Supp. 185 (Oct. 21, 1968), not only did 7th Circuit Federal District Judge Hubert L. Will hold the seizure of the sex exploitation film "Aroused" to be illegal, but he also took it upon himself to hold the film not to be obscene. His opinion cited Metzger v. Illinois (June 19, 1968), wherein another Federal District Judge of that Circuit came by a like result as to the motion picture film "I A Woman" - a film which a Louisville jury held obscene and whose verdict the Kentucky Court of Appeals ruled to be supported by overwhelming evidence. Cain v. Comm. of Ky., ___ Ky.___ (Feb. 14, 1969). A different result was reached by another Federal District

Judge in the same Circuit in Metzger v. Pearcy, 393 F.2d 202, (April 29, 1968), which ordered the film "I A Woman" returned to its owner, but also ordered its return for use at the criminal trial in Indianapolis. A 3-judge constitutional court in the Eastern District of Kentucky also ordered the motion picture film "The Female" returned, but refused to enjoin prosecution, holding the film to be obscene. Cambist Films, Inc. v. Tribell, 293 F.Supp. 407 (Nov. 26, 1968). As to this new federal policy of narrowly limiting the policy of abstention, cf. Dale Book Co. v. Leary, 233 F.Supp. 754, aff'd in 389 F.2d 40 (Jan. 2, 1968).

Sections 16 and 17 provide the solution to the above problems. By specifically authorizing a seizure incident to an arrest or in execution of a search warrant (obtained from a magistrate in an exparte proceedings) and, at the same time establishing a procedure which makes possible an immediate adversary hearing after the seizure, the same meets the due process requirement of Kingsley Books, Inc. v. Brown, supra. See Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968) wherein the Los Angeles police employed such procedure and the California courts afforded such remedies. Motion to dismiss on the part of the City granted on March 3, 1969, the United States Supreme Court opinion reading:

> "Per Curiam. The motion to dismiss is granted and the appeal is dismissed, it appearing that the judgment below rests upon an adequate state ground."

In the case of the use of search warrants however, be sure to avoid the pitfalls described in Lee Arts Theater v. Va., 20 L. Ed.2d 1313 (June 19, 1968).

Contraband - Sections 17(b) and 18

Section 18 adopts the legislative device employed in the Wisconsin jurisdiction and recently upheld by the Wisconsin Supreme Court in Misc. v. Voshart, 159 N.W.2d 1 (June 7, 1968).

Extradition - Section 19

Section 19 adopts the legislative policy mandated by the Indiana Legislature. It is the public policy of that state to use the extradition laws to bring to justice the prime movers in the industry who operate abroad under the protection of more tolerant law enforcement attorneys.

Local Control - Section 21

Section 21 contains a grant of local control to the political subdivisions to further regulate in the area of obscene control.

APPENDIX H

Page

Copy of Senate Bill 108, as originally filed in Georgia State Senate (obtained from Archives Building of Georgia State Archives)..... 3-13

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SENATE BILL 108

LC 5 0249

By: Senators Garrard of the 37th and Walling of the 42nd

A BILL TO BE ENTITLED

AN ACT

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to provide that every person who knowingly sends or causes to be sent, or brings or causes to be brought, in the State for sale or distribution or exhibition, or prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter shall be guilty of a felony; to provide that every person, who with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter to a minor under 18 years of age, is guilty of a felony; to provide that every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts herein described is guilty of a felony; to prohibit the writing, creation, solicitation, publication or distribution of certain advertising or promotional material and punish same as for a felony; to prohibit lewd exposure or simulated acts of sexual intercourse or perversion under certain circumstances to be punished as for a felony; to prohibit the procuring, counseling or assisting of any person to engage in certain conduct and to punish same as for

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felony; to prohibit the speaking or singing of any obscene song, ballad or other words under certain circumstances and to punish same as for a felony; to prohibit certain activities which, in effect, require a purchaser or consignee to receive obscene matter as a condition to sell and to punish same as for a felony; to provide for seizure; to provide for destruction of contraband; to provide for preparation of obscene matter or advertising for distribution in this State; to provide for enforcement of this Chapter; to provide for severability; to provide for affirmative defenses; to provide for a jury trial; to provide for the function of the jury and court; to provide for presumptions; to repeal a specific law; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 18, 1970 (Ga. Laws 1970, p. 173), is hereby amended by striking said Code Chapter in its entirety and by inserting in lieu thereof a new Code Chapter 26-21, which shall read as follows:

"CHAPTER 26-21. OBSCENE MATTER.

26-2101. DEFINITIONS. As used in this Chapter:

(a) A thing is 'obscene' if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of State public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated.

(b) 'Prurient interest' is defined as a shameful or morbid interest in nudity, sex or excretion, which

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goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for, or directed to a specially susceptible audience, the subject matter shall be judged with reference to such audience. For the purpose of 26-2107 of this Chapter, when the subject matter is distributed or exhibited to minors under 18 years of age, the subject matter shall be judged with reference to an average person in the community of the actual age of the minor to whom such material is distributed, or exhibited. In all other cases, the subject matter shall be judged with reference to the average person in the community.

(c) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, play, nightclub performance, television production, or other pictorial representation, or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(d) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(e) 'Distribute' means to transfer possession of, whether with or without consideration, by any means.

(f) 'Knowingly' means having actual or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents, if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material, and the failure to

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inspect the contents is either for the purpose of avoiding such disclosure or is due to reckless conduct.

(g) 'Reckless conduct' is conduct which consciously disregards a substantial and unjustifiable risk that matter may be obscene. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that an average law-abiding person would observe in the actor's situation under like circumstances.

26-2102. AFFIRMATIVE DEFENSE. This Chapter shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise proscribed by this Chapter when such possession, distribution or conduct occurs in the course of law enforcement activities, or in the course of bona fide scientific, educational, or comparable research or study, or like circumstances of justification. If this issue is not presented by the prosecution's evidence, the defendant may raise the same as an affirmative defense by presenting some evidence thereon. Where raised, the prosecution must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue.

26-2103. JURY TRIAL. Criminal prosecutions and other proceedings involving the ultimate issue of obscenity (as distinguished from the issue of 'probable cause') shall be tried by jury, unless both parties to the action waive a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court.

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26-2104. FUNCTION OF JURY AND COURT IN OBSCENITY TRIAL.

(a) The jury represents a cross section of the community and has a special aptitude for expressing the view of the average person. As the trier of fact, it is the exclusive judge of the common conscience of the community and the embodiment of community standards.

(b) Where a jury question is presented (i.e., that reasonable men may differ whether the subject matter or conduct is obscene) the trial court shall have no power either before, during, or after trial to dismiss an obscenity proceeding on the ground that the subject matter, or conduct, is not obscene as a matter of law, nor may an appellate court after trial set aside an obscenity verdict on the same grounds if an examination of the evidence indicates the verdict is supported by sufficient evidence.

(c) Any dismissal by the trial court on such grounds shall be appealable by the prosecution.

26-2105. PRESUMPTION. Every person is presumed to have knowledge of the standards that exist in the community and what the jury or trier of fact may declare to be obscene.

26-2106. GENERAL SALE OR DISTRIBUTION OF OBSCENE MATTER; PENALTY. Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution or exhibition; or in this State either (1) prepares, publishes, prints, exhibits, distributes, or offers to distribute; or (2) has in his possession with intent to distribute or to exhibit or offer to distribute; any obscene matter is guilty of a felony, and shall be punished by

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imprisonment for not less than one nor more than five years and by a fine of $5,000.

26-2107. DISTRIBUTION OF OBSCENE MATTER TO MINOR; PENALTY. Every person, who with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter to a minor under 18 years of age, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2108. HIRING, EMPLOYING MINOR TO ENGAGE IN ACTS DESCRIBED IN 26-2106; PENALTY. Every person who, with knowledge that a person is under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in 26-2106 or 26-2107, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2109. ADVERTISEMENT, PROMOTION OF SALE OF MATTER REPRESENTED TO BE OBSCENE; PENALTY. Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material for, or who otherwise advertises or promotes the sale, distribution, or exhibition of matter represented or held out by him to be obscene, whether or not such matter exists in fact, or is obscene, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

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26-2110. PARTICIPATION IN LEWD EXPOSURE OR SIMULATED ACTS OF SEXUAL INTERCOURSE OR PERVERSION AS A PART OF A PLAY.

(a) Every person who, during the course of a play, nightclub act, motion picture, television production, or other exhibition, or mechanical reproduction of human conduct, engages in any lewd exposure or simulated act of sexual intercourse or perversion, which if engaged in offstage or offscreen and in public, would be subject to prosecution, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2111. SINGING OBSCENE SONG OR BALLAD; PENALTY.

(a) Every person who sings or speaks any obscene song, ballad, or other words in any play, nightclub act, motion picture, television production, or other exhibition or medium reproducing human conduct, or in any public place, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

(b) Every person who procures, counsels, or assists any person to engage in such conduct, or who knowingly exhibits, or procures, counsels, or assists in the exhibition of a motion picture, television production, or other mechanical reproduction containing

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such conduct, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2112. REQUIRING PURCHASER OR CONSIGNEE TO RECEIVE OBSCENE MATTER AS CONDITION TO SALE; PENALTY. Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter, is guilty of a felony, and shall be punished by imprisonment for not less than one nor more than five years and by a $5,000 fine.

26-2113. PROBABLE CAUSE FOR SEIZURE TO BE SUMMARILY DETERMINED.

(a) If the seizure be controverted by any interested person, the court to whom any obscene matter is delivered pursuant to 26-2112 of this Chapter or to the return of a search warrant shall within one day after service upon the prosecuting attorney of a motion to suppress the evidence or restore the matter, proceed to take testimony in relation thereto. A decision as to whether there is probable cause to believe the seized material to be obscene shall be rendered by the court within two days of the conclusion of the restoration proceedings.

(b) If the motion to suppress the evidence is granted on the grounds of an unlawful seizure, the

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property shall be restored unless it is subject to confiscation as contraband, in which case it shall not be returned.

26-2114. CONTRABAND; DESTRUCTION OF OBSCENE MATTER OR ADVERTISEMENT OF MATTER REPRESENTED TO BE OBSCENE.

(a) Obscene matter and advertisements for matter represented to be obscene are contraband and shall be destroyed.

(b) Upon the conviction of the accused or rendition of a court order declaring such matter to be contraband and subject to confiscation, the court shall, when such judgments become final, order, upon five days' notice to the defendant, any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the District Attorney or solicitor or any law enforcement agency, to be destroyed, and the court shall cause to be destroyed any such material in its possession or under its control, retaining only such copies as are necessary for law enforcement purposes.

26-2115. PREPARING OBSCENE MATTER OR ADVERTISING ELSEWHERE FOR SALE OR DISTRIBUTION IN THIS STATE; EXTRADITION. Every person, whether or not he is a citizen of or present in this State, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this State, or who knowingly sends or causes to be sent, or brings or causes to be brought by any means, into this State for sale or distribution therein, any obscene matter, or any advertising promoting the sale or distribution of matter represented or held out to be obscene, whether or not such matter exists in fact or is obscene, shall be subject to the penalties of this Chapter, and the executive authority of this State

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shall demand extradition of such person from the executive authority of the State in which such person is found.

26-2116. POLICY. The several sheriffs, constables, District Attorneys, solicitors, other prosecuting attorneys, and all other law enforcement officials shall vigorously enforce this Chapter within their respective jurisdictions.

26-2117. SEVERABILITY. If any provision hereof or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable.

26-2118. SPECIFIC REPEALER. An Act approved April 2, 1969 (Ga. Laws 1969, p. 222), relating to the sale or delivery of certain harmful material to minors, is hereby repealed in its entirety."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

LC S 0249

S. B. No. 108

A BILL

To be entitled an Act to amend Code Chapter 26-21, relating to distributing obscene matter, as amended, so as to substantially change said Code Chapter; to repeal conflicting laws; and for other purposes.

2-3 1921

The Committee of the Senate on Judiciary recommends that this Bill do pass by substitute SBH-113

Chairman.

IN SENATE

Read 1st Time Jan. 22 1921

Read 2nd Time Mar. 4 1921

Read 3rd Time March 5 1921

and Passed by Unanimous

Ayes 29 Nays 0

Secretary of the Senate.

By GARRARD of the 37th

WAIVING OF THE 43rd

Referred to Committee on Judiciary

APPENDIX I

Page

Copy of substitute Senate Bill 108, offered by the Senate Committee on the Judiciary on March 4, 1971, proposing new code sections 26-2103, 26-2104, 26-2105 and 26-2106 and an amendment to existing code section 26-2601(a) 3-11

(Obtained from Archives Building of Georgia State Archives)

The Senate Committee on Judiciary offers the following substitute to SB 108:

A BILL TO BE ENTITLED

AN ACT

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), is hereby amended by adding a new sentence at the end of Code Section 26-2601(a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code Section 26-2601(a) shall read as follows:

ADOPTED IN SENATE
3-5 1971
Ayes 44 Nays 0
Hamilton Jr.

ADOPTED IN [illegible]
3-5
Ayes 44 Nays 0
Hamilton Jr.

LC 3 01375

"26-2601. Distributing obscene materials.--(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be

known as Code Section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section 26-2106 which shall provide as follows:

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

LC 3 01378
(SCS)

SENATE BILL 108

By: Senators Garrard of the 37th and Walling of the 42nd

A BILL TO BE ENTITLED

AN ACT

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), is hereby amended by adding a new sentence at the end of Code Section 26-2601(a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code Section 26-2601(a) shall read as follows:

LC 3 01376
(SCS)

"26-2601. Distributing obscene materials.—.a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be

known as Code Section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section 26-2106 which shall provide as follows:

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

LC 3 01376
(SCS)

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

S.B. 108 LC 5 0249

ANALYSIS

Substantially changes criminal laws relating to obscene materials; repeals Ga. Laws 1969, p. 222, relating to distribution of obscene materials to minors; replaces Code Chapter 26-21, relating to distributing obscene materials.

S. B. No. 108 — To Gov. 3/23/71

A BILL

To be entitled an Act to amend Code Chapter 26-21, relating to distributing obscene matter, as amended, so as to substantially change said Code Chapter; to repeal conflicting laws; and for other purposes;

March 6, 1971

The Committee of the House on Special Judiciary reports that this Bill do pass

Horace A. Rush
Chairman

IN SENATE

Read 1st time Jan. 22, 1971
Read 2nd time Mar. 4, 1971
Read 3rd time Mar. 5, 1971
And Passed
Ayes 29 Nays 0

Hamilton McWhorter Jr.
Secretary of the Senate

ENGROSSING

March 5, 1971

The Committee of the Senate on Senate Administrative Affairs has examined the within and finds the same properly engrossed.

Frank Ellis Jr.
Chairman

IN HOUSE

Read 1st time Mar. 5, 1971
Read 2nd time Mar 6, 1971
Read 3rd time Mar 9, 1971
And Passed
Ayes 104 Nays 4

Brian Wrenn
Clerk of the House

By: Senators Garrard of the 37th and Walling of the 42nd

Special Judiciary

Signed by Governor
4/1/71

APPENDIX J

Page

Senate Bill 108, as approved by Governor of Georgia on April 1, 1971, enacting new code sections 26-2103, 26-2104, 26-2105 and 26-2106 and amending existing code section 26-2601(a). 3-6

(Obtained from Archives Building of Georgia State Archives)

Senate Bill 108, as printed in the Georgia Laws, 1971 Session at pp 344-346. 7-9

A BILL

To amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. Laws 1970, p. 173), is hereby amended by adding a new sentence at the end of Code Section 26-2601(a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code Section 26-2601(a) shall read as follows:

"26-2601. Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance."

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section to be known as Code Section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code Section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code Section 26-2106 which shall provide as follows:

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

APPROVED
APR 1 1971
BY GOVERNOR

Section 4. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 1, 1971.

CRIMES—OBSCENE MATTERS—PUBLIC NUISANCE, ETC.

Code Chapter 26-21 Amended.

No. 304 (Senate Bill No. 108).

An Act to amend Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. L. 1970, p. 173), so as to define the word "knowing" as used in said Chapter; to provide that the use of any premises in violation of the Chapter shall constitute a public nuisance; to provide that it shall be unlawful to participate in exhibitions of indecent exposure or to counsel a person to so participate, and to provide punishment therefor; to provide that obscene materials shall be contraband; to provide for severability; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code Chapter 26-21, relating to distributing obscene matter, as amended, by an Act approved March 10, 1970 (Ga. L. 1970, p. 173), is hereby amended by adding a new sentence at the end of Code section 26-2601 (a) to read as follows:

"Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.",

so that when so amended, Code section 26-2601 (a) shall read as follows:

"26-2601. Distributing obscene materials. (a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." Code § 26-2601 amended. "Knowing" defined.

Section 2. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section to be known as Code section 26-2103 which shall provide as follows:

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance." Code § 26-2103 enacted.

Section 3. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section to be known as Code section 26-2104 which shall provide as follows:

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband." Code § 26-2104 enacted.

Section 4. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section to be known as Code section 26-2105 which shall provide as follows:

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code section 26-2011 if performed in a Code § 26-2105 enacted.

public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

Penalty.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

Section 5. Said Code Chapter 26-21 is hereby further amended by adding thereto a new Code section 26-2106 which shall provide as follows:

Code § 26-2106 enacted.

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Effective date.

Section 6. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 1, 1971.

REVENUE—CIGAR AND CIGARETTE TAX EXEMPTION—VETERANS HOMES.

No. 389 (Senate Bill No. 295).

An Act to amend an Act imposing a tax upon the sale, use or other disposition of cigars and cigarettes within this State, approved March 1, 1955 (Ga. L. 1955, p. 268), as amended, so as to provide that the taxes imposed by this

APPENDIX K

Page

Albany Herald news article of May 13, 1971, reporting on Dougherty County District Attorney's warning letter to theater operators. 3

District Attorney Promises Crackdown On Sex Movies Here After Jury Action

6-13-71

District Attorney Robert Reynolds today served notice on local theaters that he would enforce a Georgia law going into effect July 1 and dealing with obscene movies.

The action followed presentments today by a Dougherty Superior Court grand jury, which set forth that "We are in full support of Georgia Senate Bill [illegible] House Bill 207 relating to distribution of obscene matters . . . and direct the district attorney to fully enforce all provisions of these bills."

Down, Too . . .

The bill outlaws "adult bookstore" materials and the showing of X-rated films in "adult movie" houses. It defines an "adult movie house" as "any movie theater which on regular, continuing basis shows films rated X by the Motion Picture Coding Association of America, or any movie which presents for public viewing on a regular, continuing basis so-called adult films depicting sexual conduct."

Reynolds sent all local theaters the following letter:

"Pursuant to the instructions of the May, 1971 grand jury, I intend to enforce the laws which go into effect on July 1, 1971. I am enclosing a copy of these laws which go into effect July 1, 1971."

The grand jurors in other sections of the presentments expressed concern over "child delinquency and school truancy" and its alarm "in fears of the amount of narcotics traffic in our community."

They recommended the employment of a full-time deputy to work with youth of the community "toward building a better relationship between youth and law enforcement."

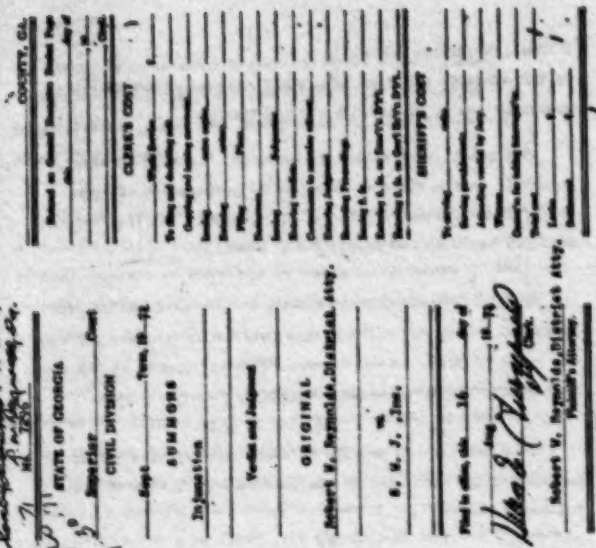
APPENDIX L

Robert W. Reynolds, District Attorney on behalf of the *State of Georgia v. S.W.J. Inc.* (being a Petition for an Injunction) in the Superior Court of Dougherty County, C.A. 7296

Papers included in Appendix	Page
Summons issued Aug. 16, 1971	3
Petition for Injunction, filed Aug. 16, 1971	4-6
Order to show cause on Aug. 23, 1971	6
Defendants Response to Petition, filed Aug. 19, 1971	7-10

Petition for Removal in Robert W. Reynolds, District Attorney, on behalf of the *State of Georgia v. S.W.J. Inc.*, in the United States District Court for the Middle District of Georgia, Albany Division, filed Friday, Aug. 20, 1971

Papers included in Appendix	
Petition for Removal, filed Aug. 20, 1971	11-29



COUNTY, GA.

Return to Court Docket Entry Page No. ____ of ____

No. ____ Term, 19__

CLERK'S COST

Docket Entry ____

To filing and docketing suit ____

Copying and issuing summons ____

Issuing ____ writs ____

Issuing ____ subpoenas ____

Filing ____ Pltn. ____

Recording ____ Judgments ____

Issuing ____ writs ____

Commission to examine witness ____

Recording Judgment ____

Recording Proceedings ____

Issuing ____ fi. fa. ____

Recording ____ fi. fa. on Docket Entry ____

Recording ____ fi. fa. on Docket Entry ____

SHERIFF'S COST

To service ____ writs ____

Serving garnishments ____

Attending court ____ days ____

Mileage ____

Deputy's fee taking testimony ____

Total cost ____

Levies ____

Deliveries ____

STATE OF GEORGIA

Superior Court

CIVIL DIVISION

Sept. Term, 19--22

SUMMONS

Injunction

Verdict and Judgment

ORIGINAL

Robert W. Reynolds, District Atty.

vs.

S. W. J., Jnr.

Filed in office, this 16 day of Aug 19--22

Clerk

Robert W. Reynolds, District Atty.

Plaintiff's Attorney

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

personally with a true copy of the within petition and summons.

This the _____ day of _____, 19__

_____

Sheriff.

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

with a true copy of the within petition and summons by leaving same at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

This the _____ day of _____, 19__

_____

Sheriff.

GEORGIA, Dooghat COUNTY:

I have this day served the Defendant Wife Jo

a corporation, with a true copy of the within petition and summons by handing same to person to _____

Robert Woodard, an officer of said corporation.

This the 16 day of Aug 1922

C Thompson Dy

Sheriff.

By _____ Dep.

1-10-74

7896

GEORGIA, DOUGHERTY COUNTY

TO THE SUPERIOR COURT OF SAID STATE AND COUNTY AND TO THE HONORABLE ASA D. KELLEY, JR., JUDGE THEREOF:

The petition of Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, on information of Lynn Stout, Investigator for the Dougherty County Sheriff, brings this his petition and respectfully shows:

(1)

S. W. J., Inc., defendant herein, is a resident of said State and County and operates and does business under the name and style of Broad Avenue Cinema, which is located at 248 Broad Avenue in the City of Albany, Dougherty County, Georgia.

(2)

This petition is brought to abate and enjoin a public nuisance being conducted by the defendant by virtue of the following facts.

(3)

Since July 1, 1971, the defendant has daily exhibited motion pictures showing human conduct at said premises at 248 Broad Avenue to members of the public and to the said Lynn Stout, which would be public indecency under Code Section 26-2011 if performed in a public place because on a continuous basis, from July 1, 1971 and up and until the filing of this petition defendant has daily shown, exhibited, and disseminated motion pictures showing various persons in acts of

(a) sexual intercourse

(b) lewd exposure of sexual organs

(c) lewd appearance in a state of partial or complete nudity

(d) a lewd caress or indecent fondling of the body of another person

(4)

Petitioner attaches hereto and makes a part hereof, Exhibit I, which are photographs of a cross section of the movie pictures which have been exhibited at said premises since July 1, 1971.

(5)

The officers of said defendant corporation are Whitfield S. Woodall, Billy Wayne Simpson, and Billy R. Jenkins, and said officers had actual knowledge of the obscene nature of the subject matter of the motion pictures being exhibited on said premises.

(6)

The lewd, vulgar and obscene motion pictures exhibited by defendant greatly tend to corrupt the morals of the public in general and the youth of this community in particular and petitioner has no adequate remedy at law because while the defendant's conduct constitutes a crime, a corporation, if convicted, can only be fined, and the corrupt and lewd pictures will continue to be exhibited by defendant and for these reasons equity should grant petitioner a temporary restraining order and a permanent injunction.

WHEREFORE, petitioner prays:

(1) That process issue requiring the defendant to be and appear and answer this complaint and that Whitfield Woodall be served in person with a copy of this complaint.

(2) That a permanent injunction be granted for the restraint and abatement of the public nuisance existing on the premises at the Broad Avenue Cinema at 348 Broad Avenue and pending the trial of this case the defendant be temporarily restrained and enjoined from the continuance of said nuisance upon said premises.

Robert N. Reynolds
DISTRICT ATTORNEY

GEORGIA, DOUGHERTY COUNTY

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Stout, who after being first duly sworn, states on oath that the facts set forth in the above and foregoing petition are true and correct.

Lynn S. Stout

Sworn and subscribed to before me this 12th day of August, 1971.

Dorothy W. Flaggard
Notary Public, Dougherty County, Georgia

ORDER

The above and foregoing petition having been read and considered let the same be filed and let a copy of the petition along with a copy of this order be served upon the defendant in person.

The defendant is required to show cause before me at the Courthouse in Albany, Georgia, on the 23 day of August, 1971, at 11 o'clock AM. why the prayer of the petitioner should not be granted and why the defendant should not be temporarily restrained from carrying on a public nuisance upon said premises pending the trial of this case.

This 12 day of August, 1971.

JUDGE, DOUGHERTY SUPERIOR COURT

IN THE SUPERIOR COURT DOUGHERTY COUNTY, STATE OF GEORGIA
CIVIL ACTION FILE NO. 7296

ROBERT W. REYNOLDS, DISTRICT ATTORNEY ON BEHALF OF THE STATE OF GEORGIA,

Plaintiff

Vs.

S. W. J., INC.,

Defendant

PETITION FOR INJUNCTION

FILED IN OFFICE
This 19 day Aug 1971
Carson B. Carver
Clerk
By

SMITH, GARDNER, WIGGINS, GEER & BRAMBERRY
ATTORNEYS AT LAW
ALBANY, GEORGIA

Dismissed by Plaintiff's Atty.
Aug
Aug
1-10-74

IN THE SUPERIOR COURT DOUGHERTY

COUNTY, STATE OF GEORGIA

ROBERT W. REYNOLDS, DISTRICT ATTORNEY ON BEHALF OF THE STATE OF GEORGIA,	)	CIVIL ACTION
Plaintiff	)	FILE NO. 7296
VS.	)	
S. W. J., INC.,	)	
Defendant	)	PETITION FOR INJUNCTION

The defendant enters its responsive pleading to the petition in the above stated matter as follows:

FIRST DEFENSE

1.

The petition fails to state a claim against this defendant upon which relief may be granted.

SECOND DEFENSE

2.

Defendant admits Paragraph 1 of the petition.

3.

Defendant denies Paragraphs 2, 3, 4, 5 and 6 of the petition.

THIRD DEFENSE

4.

Defendant shows that to grant the relief sought by the petition would deprive defendant of its rights under the First Amendment to the United States Constitution.

[illegible]

WHEREFORE, defendant prays that the petition be dismissed and that defendant be discharged.

SMITH, GARDNER, VIGGINS, GEER & BRIMBERRY

BY: Peter Zack Geer
PETER ZACK GEER
COUNSEL FOR D.V.J., INC.

[illegible]

This is to certify that I have this day served counsel for the opposite party in this case with a copy of this pleading by placing same in the United States mail in a properly addressed envelope with sufficient postage thereon.

This 8th day of August, 1971.

Smith, Gardner, Viggins, Geer & Brimberry

By: Peter Zack Geer (AW)
Attorneys for Defendant

POOR COPY

GEORGIA, ROCKDALE COUNTY

Personally appearing before the undersigned attesting officer comes now BILLY R. JENKINS who, after being first duly sworn deposes and upon oath says that he is President of the defendant corporation, SHJ, Inc. and that the denials, facts and allegations contained in the attached and foregoing pleadings are true and correct to the best of his knowledge and belief.

BILLY R. JENKINS

Sworn to and subscribed before
me this the 16th day of
August, 1971.

Evelyn K. Compton
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
GEORGIA, ALBANY DIVISION

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, ON BEHALF OF THE STATE OF GEORGIA,

Plaintiff

Vs.

S.W.J., INC.,

Defendant

PETITION FOR REMOVAL

FILED IN OFFICE

this 20 day of Aug 19 91

Susan B. Carmen
Clerk
Dep

SMITH, GARDNER, WIGGINS,
GEER & BRIMBERRY
ATTORNEYS AT LAW
ALBANY, GEORGIA 31701

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, ON BEHALF OF THE STATE OF GEORGIA,	IN THE SUPERIOR COURT OF DOUGHERTY COUNTY, GEORGIA
Plaintiff	CIVIL ACTION FILE NO. 7296
VS.	
S.W.J., INC.,	
Defendant	PETITION FOR INJUNCTION

FILED in Office AUG 20 1971 Deputy Clerk, U.S. District Court

Defendant in the above identified and numbered action now pending in the above stated Court, files this petition for removal to the United States District Court Middle District of Georgia, Albany Division, and shows:

1.

That a Civil Action for Injunction has been commenced and is now pending in the Superior Court of Dougherty County, Georgia, Case No. 7296, wherein Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, is plaintiff and your petitioner herein for removal is defendant, said action being hereinafter sometimes referred to as Action No. 7296.

2.

That said Action 7296 involves the application and construction of the First Amendment to the United States Constitution.

3.

That process in said Action 7296 was served on your petitioner for removal on the 16th day of August, 1971, copy of

case being marked Exhibit "A", attached hereto and made a part hereof, the case being the only pleading served upon your petitioner for removal in said cause.

4.

That your petitioner for removal herewith presents a good and sufficient bond as provided by statute, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

5.

That a copy of all process, pleadings and orders served upon your petitioner for removal in said Civil Action No. 7296 is filed herewith as Exhibit "A" hereof.

WHEREFORE, petitioner for removal prays that said Civil Action No. 7296 now pending in the Superior Court of Dougherty County, Georgia, be removed from said State Court into United States District Court Middle District of Georgia, Albany Division, for trial and determination.

This the 20th day of August, 1971.

SMITH, GARDNER, VIGGINS, GREE & BRINKERLY

BY: Peter Zack Geer
PETER ZACK GEER
COUNSEL FOR PETITIONER FOR REMOVAL

GEORGIA, DOUGHERTY COUNTY

TO THE SUPERIOR COURT OF SAID STATE AND COUNTY AND TO THE HONORABLE ASA D. KELLEY, JR., JUDGE THEREOF:

The petition of Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, on information of Lynn Stout, Investigator for the Dougherty County Sheriff, brings this his petition and respectfully shows:

(1)

S. W. J., Inc., defendant herein, is a resident of said State and County and operates and does business under the name and style of Broad Avenue Cinema, which is located at 248 Broad Avenue in the City of Albany, Dougherty County, Georgia.

(2)

This petition is brought to abate and enjoin a public nuisance being conducted by the defendant by virtue of the following facts.

(3)

Since July 1, 1971, the defendant has daily exhibited motion pictures showing human conduct at said premises at 248 Broad Avenue to members of the public and to the said Lynn Stout, which would be public indecency under Code Section 26-2011 if performed in a public place because on a continuous basis, from July 1, 1971 and up and until the filing of this petition defendant has daily shown, exhibited, and disseminated motion pictures showing various persons in acts of

(a) sexual intercourse

(b) lewd exposure of sexual organs

(c) lewd appearance in a state of partial or complete nudity

(d). a lewd caress or indecent fondling of the body of another person

EXHIBIT "A"

(4)

Petitioner attaches hereto and makes a part hereof, Exhibit I, which are photographs of a cross section of the movie pictures which have been exhibited at said premises since July 1, 1971.

(5)

The officers of said defendant corporation are Whitfield B. Woodall, Billy Wayne Simpson, and Billy R. Jenkins, and said officers had actual knowledge of the obscene nature of the subject matter of the motion pictures being exhibited on said premises.

(6)

The lewd, vulgar and obscene motion pictures exhibited by defendant greatly tend to corrupt the morals of the public in general and the youth of this community in particular and petitioner has no adequate remedy at law because while the defendant's conduct constitutes a crime, a corporation, if convicted, can only be fined, and the corrupt and lewd pictures will continue to be exhibited by defendant and for these reasons equity should grant petitioner a temporary restraining order and a permanent injunction.

WHEREFORE, petitioner prays:

(1) That process issue requiring the defendant to be and appear and answer this complaint and that Whitfield Woodall be served in person with a copy of this complaint.

(2) That a permanent injunction be granted for the restraint and abatement of the public nuisance existing on the premises at the Broad Avenue Cinema at 248 Broad Avenue and pending the trial of this case the defendant be temporarily restrained and enjoined from the continuance of said nuisance upon said premises.

Robert K. Reynolds
DISTRICT ATTORNEY

GEORGIA, DOUGHERTY COUNTY

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Shoat, who after being first duly sworn, states on oath that the facts set forth in the above and foregoing petition are true and correct.

Lynn Shoat

Sworn and subscribed to before me this 16th day of August, 1971.

Notary Public, Dougherty County, Georgia

ORDER

The above and foregoing petition having been read and considered let the same be filed and let a copy of the petition along with a copy of this order be served upon the defendant in person.

The defendant is required to show cause before me at the Courthouse in Albany, Georgia, on the 23 day of August, 1971, at 11 o'clock A.M. why the prayer of the petitioner should not be granted and why the defendant should not be temporarily restrained from carrying on a public nuisance upon said premises pending the trial of this case.

This 16 day of August, 1971.

JUDGE, DOUGHERTY SUPERIOR COURT

EXHIBIT J

July 4, 1991
(Date)

Midnight Clambake
(Name of motion picture film)

EXHIBIT 3

July 14, 1991
(date)

The Ranger
(name of motion picture film)

EXHIBIT A

July 12, 1991
(date)

Sweet Birds of Aquatica
(name of motion picture film)

EXHIBIT I

June 12, 1971
(Date)

Sweet Bird of Paradise
(Name of motion picture film)

EXHIBIT I

July 17, 1991
(Date)

Sweet Bird of Youth
(Name of motion picture film)

EXHIBIT A

July 14, 1991
(Date)

The Revenger
(name of motion picture film)

EXHIBIT I

JULY 22nd 1971
(date)

SOUTHERN COMFORT
(name of motion picture film)

EXHIBIT I

JULY 22nd 1971
(date)

SOUTHERN COMFORT
(name of motion picture film)

EXHIBIT I

JULY 22nd 1971
(date)

TABACCO ROOT J.S.
(name of motion picture film)

STATE OF GEORGIA

Superior
COURT

Dougherty COUNTY

Civil Action, File No. 7296

Robert W. Reynolds, District Attorney

Plaintiff,

vs.

S. W. J., Inc.

Defendant.

SUMMONS

Injunction

To the above-named Defendant: S. W. J., Inc.

You are hereby commanded and required to file with the Clerk of said Court and serve upon Robert W. Reynolds, District Attorney

Plaintiff's attorney, whose address is Dougherty County Courthouse, Albany, Ga.

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons, upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This the 16 day of August, 19 71

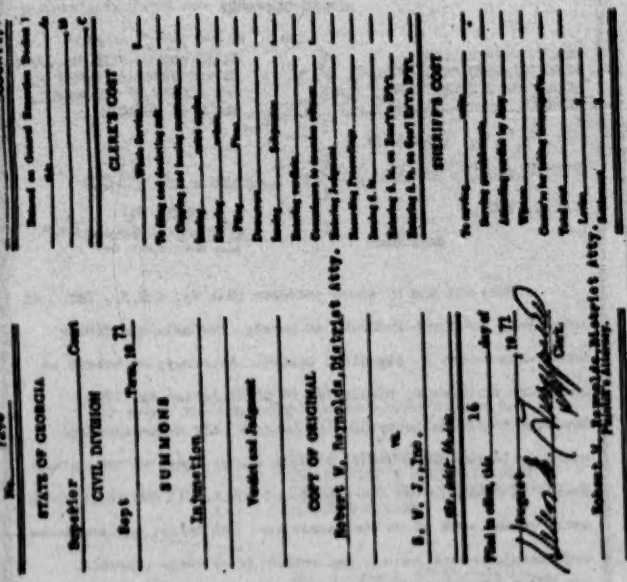
Clerk of Court.

To the Defendant upon whom this Summons is served:

This copy of Summons was served upon you on the _____ day of _____, 19__

_____

Sheriff of _____ County.



No. 7296

STATE OF GEORGIA

Superior Court

CIVIL DIVISION

Sept. Term, 19 71

SUMMONS

In Equation

Verdict and Judgment

COPY OF ORIGINAL

Robert V. Reynolds, Metrics Atty.

vs.

S. W. J., Inc.

Mr. Mitz Mohn

Filed in office, this 16 day of Aug, 19 71

Deputy Clerk

COUNTY, ss:

Personally appeared Robert V. Reynolds, Metrics Atty. who on oath deposes and says that he is the Plaintiff's Attorney in the above stated case, and that the defendant is indebted to the plaintiff in the sum of $ 0 principal, $ 0 interest, $ 0 attorney's fee, and $ 0 costs, and that the defendant is not in the military service of the United States.

Robert V. Reynolds, Metrics Atty.

Plaintiff's Attorney

Sworn to and subscribed before me this 16 day of Aug, 19 71

Notary Public

CLERK'S COST

Writ Service $

To filing and docketing suit

Copying and issuing summons

Issuing

Filing

Docketing

Issuing verdict

Issuing Judgment

Recording Proceedings

Issuing

Issuing

Issuing

SHERIFF'S COST

To service

Issuing garnishment

Attending verdict by Jury

Mileage

Costs for issuing interrogatories

Total cost

Levied on

Sold on

Returned to Court

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

personally with a true copy of the within petition and summons.

This the _____ day of _____, 19____

_____

Sheriff.

GEORGIA, _____ COUNTY:

I have this day served the Defendant _____

with a true copy of the within petition and summons by leaving same at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

This the _____ day of _____, 19____

_____

Sheriff.

GEORGIA, Dougherty COUNTY:

I have this day served the Defendant S.W.J. Inc.

a corporation, with a true copy of the within petition and summons by handing same in person to _____

Whit Woolsey, an officer of said corporation.

This the 16th day of Aug, 1971.

C. L. Crews

Dep Sheriff.

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

ALBANY DIVISION

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, ON BEHALF OF THE STATE OF GEORGIA,	I	CIVIL ACTION FILE NO. 7296 IN THE SUPERIOR COURT FOR THE COUNTY OF DOUGHERTY, STATE OF GEORGIA
Plaintiff	I	
Vs.	I	FILED at 8:30 A.M.
S.W.J., INC.,	I	AUG 20 1971
Defendant	I	Deputy Clerk, U.S. District Court

Know all men by these presents that we, S.W.J., INC., as principal, and Frank Hedrick, as surety, are held and firmly bound unto Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, plaintiff, in Civil Action No. 7296, Superior Court Dougherty County, Georgia, his successors and assigns, in the penal sum of $500.00 lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, our executors and administrators jointly and severally by these presents.

The conditions of this obligation are that whereas the said S.W.J., INC. has applied by petition to the United States District Court for the Middle District of Georgia, Albany Division, for the removal of the above stated case from the Superior Court of the State of Georgia in and for the County of Dougherty, to the United States District Court for the Middle District of Georgia, Albany Division:

Now if the said S.W.J., INC. shall well and truly pay [illegible] costs and disbursements incurred by reason of said proceedings

should it be determined that the case was not removable or was improperly removed, then this obligation to be void, otherwise to remain in force and effect.

This 19th day of August, 1971.

S. W. Tyler (PRINCIPAL)

Fred H. Hilsid (SURETY)

The above and foregoing bond is hereby approved.

JOHN P. CONART, CLERK
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

BY: Kathryn T. Campbell
KATHRYN T. CAMPBELL
DEPUTY CLERK
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

APPENDIX M

Page

Albany Sunday Herald news article of Oct. 10, 1971, reporting on civil and criminal proceedings brought by the Dougherty County District Attorney against the exhibition of the film "Carnal Knowledge" at the Martin Theatres. 3

Sun., Oct. 10, 1971 — The Albany Sunday Herald—11A

'CARNAL KNOWLEDGE'

Film Seized Here At DA Direction

10-10-71

By SAM PRUITT
Herald Staff Writer

A special force of lawmen acting on orders of District Attorney Robert Reynolds and armed with a search warrant signed by Dougherty Superior Court Judge Asa Kelley Jr., Saturday launched a surprise raid on a local movie theater and confiscated the movie "Carnal Knowledge."

In addition, the theatre manager and projectionist were charged with misdemeanor violations of Georgia law and later released after posting $100 bonds.

The "R" rated movie stars Ann - Margret and reportedly includes several nude scenes of the actress and some profanity.

Merlin Twin Theatres manager T. J. Turlington and projectionist T. W. Gordon were charged with two counts each of violating a Georgia public indecency law prohibiting public displays of sexual acts or nudity; and a newly - enacted section including motion pictures, night clubs, plays, television productions or "other exhibitions of human conduct."

Reynolds said Saturday an additional civil complaint has been filed and a hearing before Judge Kelley is scheduled for 9:30 a.m. Wednesday.

The film was confiscated by Chief Deputy Sheriff Dick Brown and County Investigator Harold Murphy shortly before the first showing was scheduled to begin at 2:30 p.m., Reynolds said.

"Contraband"

Reynolds said the film was seized on the grounds that it is "contraband" and will be held as evidence for the January Dougherty County Grand Jury.

The district attorney said he hopes the courts "will clarify" the issue and promised "we will have a decision in the near future for Dougherty County."

Reynolds was seen viewing the movie Thursday night with his wife, but declined to comment on whether his presence was a part of the "investigation" or was personal.

Albany Martin Theatres manager Victor Allen said he would have "no comment" on the confiscation and charges.

Angry Comments

Scores of would - be movie goers were turned away from the blank big screen Saturday, and such angry comments as "What the hell's going on?" and "I knew we should have gone last night," were heard.

A re - run of "Airport" was showing adjacent to "Carnal Knowledge."

A Herald employe, unaware of the confiscation, went to see the movie Saturday afternoon and was told by a cute little ticket seller, "I'm sorry, but Carnal Knowledge is not showing today. The district attorney came and took our film away."

The film began Thursday at the Gillionville - Road twin theatre that has been called Southwest Georgia's most modern and luxurious theater.

The movie has been called "brilliant" by New York Magazine critic Judith Crist; "one of the best movies ever" by Liz Smith of Cosmopolitan Magazine, and New York Times critic Vincent Canby said he was "sorry to see it end."

"Sure," said the district

APPENDIX N

Robert W. Reynolds, District Attorney on behalf of the *State of Georgia v. Martin Theatres of Georgia, Inc.* (being a Petition for Injunction) in the Superior Court of Dougherty County, C.A. 7381

Papers included in Appendix	Page
Summons, issued Sept. 8, 1971	3
Petition for Injunction, field Sept. 8, 1971	4-6
Order to show cause on Oct. 13, 1971	6
Motion for Leave to Amend	7
Order allowing Amendment, dated Oct. 12, 1971	8
Motion for Summary Judgment, filed Oct. 12, 1971	9
Order to show cause on Nov. 30, 1971	10
Recognition and Agreement, dated Nov. 30, 1971	11-14
Albany Herald news article of Dec. 1, 1971, reporting District Attorney as saying that agreement was reached on the basis of U. S. Supreme Court's refusing to hear "I Am Curious (Yellow)" appeal on Nov. 9, 1971	15
Order of Dismissal in C.A. 7381	16
Order of Nol Pros in *Georgia v. Gordon and Turlington*, No. 23877	17

COUNTY, Ga.

Issued and Entered Docket Page

This ____ day of ____, 19__

Clerk

CLERK'S COST

Writ Service	$
To filing and docketing suit	
Copying and issuing summons	
Issuing ____ extra copies	
Entering ____ orders	
Filing ____ Pleas	
Docketing ____ Judgments	
Issuing ____ Subpoenas	
Entering verdicts	
Commissions to examine witness	
Entering Judgment ____ fi	
Recording Proceedings	
Issuing ____ fi fa	
Entering ____ fi fa on Docket's Dft.	
Entering ____ fi fa on Court Entry Dft.	

SHERIFF'S COST

To service ____ writs	
Serving garnishments	
Attending verdict by Jury	
Mileage	
Clerk's fee taking interrogatories	
Total cost	
Levies	
Endorsement	

STATE OF GEORGIA

Superior Court

CIVIL DIVISION

November Term, 19 73

SUMMONS

In Justice ____ Court

Verdict and Judgment

ORIGINAL

Robert W. Reynolds, District Atty.

vs.

Martin Theatres of Georgia, Inc.

Filed in office, this 6th day of September, 19 73

Clerk

Robert W. Reynolds
Plaintiff's Attorney,

No. 7383

GEORGIA, ____ COUNTY:

I have this day served the Defendant ____

personally with a true copy of the within petition and summons.

This the ____ day of ____, 19__

____
Sheriff.

GEORGIA, ____ COUNTY:

I have this day served the Defendant ____

with a true copy of the within petition and summons by leaving same at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

This the ____ day of ____, 19__

____
Sheriff.

GEORGIA, Douglas COUNTY:

I have this day served the Defendant Martin Theatres of Ga. Inc

a corporation, with a true copy of the within petition and summons by handing same in person to ____

Shirley Snow, an officer of said corporation.

This the 9th day of Sept, 19 73

C. L. Bearup
Sheriff.
By

Shanner Dasher
Atty.

1-9-74

7381

GEORGIA, DOUGHERTY COUNTY

TO THE SUPERIOR COURT OF SAID STATE AND COUNTY AND TO THE HONORABLE ASA D. KELLEY, JR., JUDGE THEREOF:

The petition of Robert W. Reynolds, District Attorney, on behalf of the State of Georgia, on information of Lynn Stout, Investigator for the Dougherty County Sheriff, brings this his petition and respectfully shows:

(1)

Martin Theatres of Georgia, Inc., defendant herein, is a corporation with an office, agent and place of doing business in said State and County and operates and does business under the name and style of Martin Twin Theatres, which is located at 1121 Gillionville Road, and Georgia Drive-In Theatre, which is located at 106 Johnson Road in Dougherty County, Georgia.

(2)

This petition is brought to abate and enjoin a public nuisance being conducted by the defendant by virtue of the following facts.

(3)

The defendant has exhibited motion pictures showing human conduct at said premises at 1121 Gillionville Road and 106 Johnson Road to members of the public and to the said Lynn Stout, which would be public indecency under Code Section 26-2011, if performed in a public place because defendant has shown, exhibited, and disseminated motion pictures showing various persons in acts of

(a) sexual intercourse

(b) lewd exposure of sexual organs

(c) lewd appearance in a state of partial or complete nudity

(d) a lewd caress or indecent fondling of the body of another person

(4)

Petitioner attaches hereto and makes a part hereof, Exhibit I, which are photographs of a cross section of the movie pictures which have been exhibited at said premises.

(5)

The local agent and manager for said defendant is Shelby Sanders, who has actual knowledge of the obscene nature of the subject matter of the motion pictures being exhibited on said premises.

(6)

The loud, vulgar and obscene motion pictures exhibited by defendant greatly tend to corrupt the morals of the public in general and the youth of this community in particular and petitioner has no adequate remedy at law, and equity should grant petitioner a temporary restraining order and a permanent injunction.

WHEREFORE, petitioner prays:

(1) That process issue requiring the defendant to be and appear and answer this complaint and that Shelby Sanders be served in person with a copy of this complaint.

(2) That a permanent injunction be granted for the restraint and abatement of the public nuisance existing on the premises at the Martin Twin Theatres at 1121 Gillionville Road and Georgia Drive-In Theatre at 106 Johnson Road and pending the trial of this case the defendant be temporarily restrained and enjoined from the continuance of said nuisance upon said premises.

Robert W. Reynaud
DISTRICT ATTORNEY

GEORGIA, DOUGHERTY COUNTY

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Stout, who after being first duly sworn, states on oath that the facts set forth in the above and foregoing petition are true and correct.

Lynn S. Stout

Sworn and subscribed to before me this 7th day of September, 1971.

Dorothy J. Maxwell
Notary Public
Dougherty County, Georgia

ORDER

The above and foregoing petition having been read and considered let the same be filed and let a copy of the petition along with a copy of this order be served upon the defendant in person.

The defendant is required to show cause before me at the Courthouse in Albany, Georgia, on the 19 day of October, 1971, at 9:30 o'clock A.M. why the prayer of the petitioner should not be granted and why the defendant should not be temporarily restrained from carrying on a public nuisance upon said premises pending the trial of this case.

This 8 day of September, 1971.

JUDGE, DOUGHERTY SUPERIOR COURT

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

ROBERT W. REYNOLDS, District Attorney,

Plaintiff

-vs-

MARTIN THEATRES OF GEORGIA, INC.,

Defendant

CIVIL ACTION FILE NO. 7381

MOTION FOR LEAVE TO AMEND

Plaintiff moves this court for leave to file an amendment to his complaint in the above entitled cause, said amendment being as follows:

(1)

Plaintiff amends paragraph 4 of the original petition by showing that since the filing of the original petition the defendant has continued to operate a public nuisance and on October 8th and 9th at the Martin Twin Theatres Number 2 did exhibit a motion picture to the general public entitled "Carnal Knowledge" which contains scenes of human beings engaged in sexual intercourse and in partial and complete nudity and Plaintiff does hereby make said motion picture a part hereof and attaches a copy of same hereto by reference, and makes same available to this Court, and Plaintiff further shows that the defendant operates the State Theatre in Dougherty County and on October 7th through October 12th the defendant exhibited and showed a motion picture entitled "Friends", which motion picture showed human beings partially nude and engaging in indecent fondling which constitutes a public nuisance.

Robert W. Reynolds
ATTORNEY FOR PLAINTIFF

Personally before the undersigned officer authorized by law to administer oaths appeared Lynn Stout, who after first being sworn says on oath that the above and foregoing facts are true and correct.

Lynn S. Stout

Sworn to and subscribed
before me this 12th day of
October, 1971.

Dorothy W. Worrell
Notary Public
Dougherty County, Georgia

ORDER

Read and considered. The above and foregoing amendment is hereby allowed and ordered filed.

This 12th day of October, 1971.

Grace C. Kelly
JUDGE, DOUGHERTY SUPERIOR COURT

CERTIFICATE OF SERVICE

I, Robert W. Raynolds, do hereby certify that I have served a copy of the above and foregoing amendment upon Thomas W. Malone, Attorney of Record for the defendant, by mailing a copy to him with sufficient postage to insure delivery..

This 12th day of October, 1971.

Robert W. Raynolds
ROBERT W. REYNOLDS

IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT W. REYNOLDS,

Plaintiff,

Vs. CIVIL ACTION NUMBER 7381

MARTIN THEATRES OF GEORGIA, INC.,

Defendant.

MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant in the above-styled cause and moves the Court to enter, pursuant to Section 56 of the Georgia Civil Practice Act, (Ga. Code Ann. 81A-156), a summary judgment in favor of the Defendant on Count One of the complaint on the ground that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment on Count One of the Complaint as a matter of law.

This motion is based upon:

(a) The petition filed by Robert W. Reynolds on behalf of the State of Georgia.

(b) The depositions of Robert W. Reynolds; and Lynn Stout.

WHEREFORE, movant prays that this motion be sustained and that a summary judgment be entered in favor of Defendant on Count One of the complaint.

MALONE, DRAKE & MALONE

BY: /s/ THOMAS EM. MALONE
Attorneys for Martin Theatres of Georgia, Inc.

MALONE, DRAKE & MALONE
Attorneys at Law
[illegible]
ALBANY, GA.

IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT H. REYNOLDS,	:	CIVIL ACTION
Plaintiff,	:	FILE NUMBER 7 3 8 1
Vs.	:	
MARTIN THEATRES OF GEORGIA, INC.,	:	ORDER
Defendant.	:	

The above and foregoing Motion for Summary Judgment having been read and considered, it is hereby ordered that the same be filed, that a copy be served upon Robert H. Reynolds, District Attorney, as well as a copy of this Order.

The hearing heretofore scheduled to be held on October 13, 1971, at 9:30 o'clock A.M. is hereby continued until 10:30 o'clock A.M. on the 30 day of November, 1971, at which time the above and foregoing Motion for Summary Judgment shall be considered along with any other matter in this action which may appropriately come before the Court.

This 12th day of October, 1971.

[signature]
RUE E. ENTEN, JUDGE, DOUGHERTY
SUPERIOR COURT

I certify that prior to filing the above motion and order I served on the Plaintiff's Attorney a copy of the same by depositing a copy in the mail addressed to the Attorney at his office in the county.

10-12-71

[signature]
Attorney for Defendant

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IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT W. REYNOLDS, DISTRICT ATTORNEY, Plaintiff,	CIVIL ACTION FILE NUMBER 7361
VS	
MARTIN THEATRES OF GEORGIA, INC., Defendant.	RECOGNITION AND AGREEMENT

This recognition and agreement entered into this 30th day of November, 1971, by and between ROBERT W. REYNOLDS DISTRICT ATTORNEY, Dougherty County, Georgia, and MARTIN THEATRES OF GEORGIA, INC., in an effort to resolve disputed issues existing between them and in order to settle multiple matters pending in Courts both State and Federal;

WITNESSETH

WHEREAS, MARTIN THEATRES OF GEORGIA, INC. is not in the business of producing motion pictures and is totally and utterly limited to showing the films made available by the film-makers and does not control the content of any film whatsoever even though it desires to provide the members of the viewing public with the best motion picture entertainment which the film-makers make available, and in particular desire to bring wholesome family type entertainment to members of the viewing public, and

WHEREAS, ROBERT W. REYNOLDS is the duly elected and constituted District Attorney for Dougherty County, Georgia, and is charged with the duty and responsibility of representing the State in matters which come before the Superior Court of Dougherty County, Georgia, and

[illegible]

Frances Dale
Dep.

1-9-74

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Page Two.

WHEREAS, ROBERT W. REYNOLDS and MARTIN THEATRES OF GEORGIA, INC., recognize the question of determining what is obscenity beyond the constitutional protections and what is not obscene and therefore protected material is a difficult and involved question upon which even courts oftentimes disagree, and

WHEREAS, ROBERT W. REYNOLDS and MARTIN THEATRES OF GEORGIA, INC., further recognize that in the last analysis only a local jury can determine the question of obscenity concerning any given film, and

WHEREAS, ROBERT W. REYNOLDS and MARTIN THEATRES OF GEORGIA, INC. recognize the burdensome expense and court congestion which necessarily results from a trial by jury of the obscenity issue pertaining to any given film, and

WHEREAS, ROBERT W. REYNOLDS has caused the film "Carnal Knowledge" to be seized as being obscene and beyond the constitutional protections, and

WHEREAS, MARTIN THEATRES OF GEORGIA, INC. contends "Carnal Knowledge" is not an obscene film and that the members of the viewing public have a right to see said film and they have a right to exhibit said film for the viewing public in Dougherty County, Georgia, as said film has been exhibited throughout the State of Georgia as well as the United States of America;

NOW, THEN, in recognition of the above stated paragraphs, it is agreed between the parties as follows:

-1-

The film "Carnal Knowledge" will not be shown in Dougherty County, Georgia, until by judicial determination the film "Carnal Knowledge" is found to be "not obscene". The determination mentioned shall be by the Georgia court system.

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Page Three.

-3-

MARTIN THEATRES OF GEORGIA, INC. agree and pledges to the people of Dougherty County, Georgia, that the following regulations, based on existing film industry ratings, will be carried out to the best ability of MARTIN THEATRES OF GEORGIA, INC.:

1. No X rated films will be shown at any theatre operated by MARTIN THEATRES OF GEORGIA, INC. in Dougherty County, Georgia;

2. No R rated film will be shown as a double feature with a G or GP film;

3. No scenes from R rated films will be shown as previews at a G or GP film and;

4. No unmarried person under the age of 18 years will be admitted to an R rated film unless accompanied to the theatre by his or her parent or legal guardian;

5. MARTIN THEATRES OF GEORGIA, INC. will exercise their best efforts to determine the age of any person when in doubt as to age and will further permanently post at the front of the theatre a notice concerning the 18 year age limit for R rated films.

6. MARTIN THEATRES OF GEORGIA, INC. further agrees that it will exercise its best efforts in good faith to comply with all laws of the State of Georgia even though it is specifically recognized that the question concerning obscenity is a purely subjective question which will necessarily lend itself to differing points of view.

-3-

This recognition and agreement is in no way to be

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Page Four.

considered as a waiver of the rights of either party, but is to be construed as merely a statement of present intention of both parties' good faith effort to sensibly deal with involved and subjective questions considered herein, and shall not be construed as creating liability of any nature whatsoever on the part of either party.

ROBERT W. REYNOLDS, District Attorney

BY: [signature]
HARRY D. WIGHT
As Counsel for Robert W. Reynolds

MARTIN THEATRES OF GEORGIA, INC.

BY: [signature]
GEORGE M. MAYSON
Counsel for Martin Theatres of Georgia, Inc.

District Attorney, Theater Settle 'Carnal Knowledge'

12-1-71

By SAM PRUITT
Herald Staff Writer

An agreement has been reached between District Attorney Robert Reynolds and Martin Theatres operators in the obscenity controversy over the movie "Carnal Knowledge."

All litigation, both criminal and civil, has been dismissed against the theater chain and the confiscated film has been returned in exchange for the theater's agreement not to show any "X" rated films in Dougherty County; not to show "R" rated films on the same double - feature bill with a "G" or "GP" rated film; not to show "R" rated movies in previews at a "G" or "GP" rated film; and not to allow unmarried persons under 18 to attend "R" rated films unless accompanied by parent or guardian.

In addition, Martin Theatres agreed not to show "Carnal Knowledge" in Dougherty County "unless by a final judicial determination the film "Carnal Knowledge" is found to be 'not obscene'."

"Good Faith"

Reynolds said he feels that "the laws of Georgia are being complied with in Dougherty County as far as Martin Theatres are concerned," and added that "I feel Martin Theatres acted in good faith and will continue to do so."

Martin Theatres' attorney Tom Malone said he feels the agreement is a fair and equitable one "under the circumstances."

Both Reynolds and Martin Theatres said the agreement is "merely a statement of present intentions of both parties' good faith effort to amicably deal with involved and subjective questions."

In addition to its specific terms, Martin Theatres agreed to exercise its "best efforts to determine the age of any person when in doubt as to age and will further permanently post in the front of the theater a notice concerning the 18 - year - age limit for 'R' rated films."

Cases Dismissed

Reynolds said all legal action initiated by his office, including criminal and civil actions, has been dismissed and that "no further cases are pending against Martin Theatres in Dougherty County."

Reynolds said the agreement was reached on the basis of a recent Georgia Supreme Court ruling which held the film "I Am Curious Yellow" to be obscene.

The U.S. Supreme Court declined to review the Georgia court decision, thereby upholding the action, he said.

Malone said a Federal suit challenging Reynolds' actions has similarly been dismissed.

Reynolds ordered the film seized Oct. 9 and at a surprise raid on Martin Twin Theater, arrested manager T. J. Turlington and proprietress T. W. Gordon on charges of violating a Georgia public indecency law.

Similar Actions

Reynolds said similar anti - obscenity actions brought by his office against 2W7 Inc., operators of Broad Avenue Cinema, have been dismissed in civil court here, but that misdemeanor criminal charges will be "disposed of" in the January term of Dougherty Superior Court.

Attorneys for 2W7 Inc. have dismissed a challenge to Reynolds' authority in the case filed in U.S. District Court here, he said.

"The Broad Avenue Cinema is now operating in compliance with the laws of the State of Georgia," Reynolds said.

Asked if he plans further anti-obscenity moves, Reynolds replied that "This (movies) is the only area of obscenity that I've received grand jury instructions in, but if any citizen has any information concerning obscenity of any type, I'm sure the January grand jury would like to have it."

A grand jury earlier this year urged Reynolds to strictly enforce a newly - enacted Georgia anti - obscenity law.

His subsequent investigations, arrests and film seizures stirred a storm of controversy, with supporters applauding his actions and critics accusing him of trying to censor adult materials.

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IN THE SUPERIOR COURT FOR THE COUNTY
OF DOUGHERTY, STATE OF GEORGIA

ROBERT W. REYNOLDS, DISTRICT ATTORNEY,	:	CIVIL ACTION
Plaintiff,	:	FILE NUMBER 7301
Vs.	:	
MARTIN THEATRES OF GEORGIA, INC.,	:	ORDER OF DISMISSAL
Defendant.	:	

Upon oral motion made by the parties to the above referenced cause, and consideration of the recognition and agreement which has been entered into between the parties, it is hereby ordered that the above-styled action be and the same is hereby dismissed.

The Sheriff of Dougherty County, Georgia, is hereby authorized and directed to return to MARTIN THEATRES OF GEORGIA, INC. the reels of film comprising the moving picture "Carnal Knowledge".

This 30 day of November, 1971.

Judge, Dougherty Superior Court

GEORGIA, DOUGHERTY COUNTY.
I HEREBY CERTIFY that the above and foregoing is a true copy of the original filed in this office.
EVANS B. HINSON, Clerk
By Evans Hinson Dep.
Date
1-9-74

WITNESSES FOR THE STATE

The Defendant

Mpsc

No. 23327

SUPERIOR COURT

DOUGHERTY COUNTY

Term, 19 74

THE STATE

vs

Leo J. Harden and

T. Lambright

and Calvin Cook Godfrey

24-3112 24-3104

ACCUSATION

ROBERT V. REYNOLDS,
District Attorney.

Filed in office this 7th day of Oct. 1974

Clerk

The Defendant

as being formally arraigned, entered

said by Jury and pleads guilty.

This day of

19

District Attorney

Defendant's Attorney.

Verdict

We the Jury find the Defendant

guilty.

This day of

19

Foreman

on motion of D.A. within accusation is hereby nol prossed
10-21-74

Agnes H. Kelly
Judge

Read

Emanuel Rad
Dep.

1-9-74

APPENDIX O

	Page
Albany News Article of Feb. 8, 1972 Reports District Attorney Petition for Adversary Hearing.	3
Albany News Article of Feb. 9, 1972 Reports City Court Order that "Carnal Knowledge" be seized.	4
Albany Herald News Article of Feb. 10, 1972.	5
Albany Herald News Article of Mar. 20, 1972, Reports opening of first "Carnal Knowledge" Trial.	6
Albany Herald News Article of Mar. 21, 1972, Reports first Carnal Knowledge jury deadlocked.	7
Albany Herald News Article of Mar. 22, 1972, Reports opening of second trial.	8
Albany Herald News Article of Mar. 24, 1972, Reports jury finds Carnal Knowledge obscene.	9

'Carnal's' Back

D. A. Seeking To Block Award Movie Third Time

2-7-72

By JAMES H. [illegible], JR.
Herald Staff Writer

District Attorney Robert Reynolds today moved [illegible] to prevent a third Albany showing of the award-winning movie, "Carnal Knowledge."

Albany is the only city in the nation to act officially against the film.

Reynolds filed a petition on behalf of Dougherty County Investigator Lynn Stout with Dougherty Superior Court Judge Asa D. Kelley Jr. for an adversary hearing after the owners of Broad Avenue Cinema announced yesterday that they had rescheduled the film for an engagement beginning Wednesday.

Last month, Reynolds had seized the movie, had it shown to the Dougherty Superior Court Grand Jury, and had obtained four indictments against the owners, a projectionist and ticket seller on grounds of allegedly violating Georgia obscenity laws.

Action Blocked

But the theatre owners blocked this action by alleging in a motion to suppress that the seizure of the film was unconstitutional because a prior adversary hearing before a magistrate had not been held.

Judge Kelley so ruled and ordered the seized film returned to the theatre owners.

The petition filed Monday alleges that there is probable cause that the film violates the Georgia obscenity code.

The petition alleges that the "film contains scenes of . . . lewd states of nudity and indecent fondling. . ." Stout urged that the court make a judicial determination as to whether or not the film is obscene."

Seek Hearing

The petition also requested that the court issue an injunction restraining the defendants from exhibiting the movie publicly until a hearing can be scheduled.

Judge Kelley has not yet set a date for a hearing.

"Carnal Knowledge" has been shown throughout the nation, has grossed more than $20 million and has been nominated for seven awards by the Motion Picture Academy of Arts and Sciences.

So this is where the public came in — as they say at the movies.

The first "bust" of "Carnal Knowledge" was made Oct. 11 at the Martin Twin Theaters. But an agreement was reached between Reynolds and Martin Theaters whereby charges were dropped after the management agreed not to show the movie in Dougherty County "unless by a final judicial determination the film is found not to be obscene."

Brave Tornado Alert

Wendell and Jenkins later attempted to show the critically - acclaimed film in Albanians, and again the law intervened last month. The only persons who got a chance to look, aside from the 176 patrons who braved tornado warnings and torrential rains for the first showing, were the members of the grand jury.

Now the film has been returned.

Now the theater operators are once again offering Ann Margret & Co. for public consumption.

Missing 'Carnal' Ordered Seized by City Court Edict

2-9-72

By DAVID FULLER
Herald Staff Writer

At an adversary hearing in City Court today, Judge Pro Hac Vice William T. Jones signed an order authorizing County Sgt. Lynn Reed, to seize the movie "Carnal Knowledge" "if it can be found."

Charles Hatcher, attorney for the defendants, Walt Wendell and Billy Jenkins, owners of the Grand Avenue Cinema, said the defendants did not have the film with them in court. Hatcher refused to guess the court's showing of the film until counsel, Peter Bank Gem, could be present.

Hatcher said Gem was not able to be present today because he is trying a capital case in Gwinnett County Superior Court.

Applies For Hearing

Dist. Atty. Robert Reynolds had applied for an adversary hearing to determine judicially whether the film was obscene, violated the state's obscenity laws, and could be seized.

Reynolds' application for the hearing came after Gwinnett Superior Court Judge Ana S. Kelley ruled last week that a previous seizure of the film was illegal because an adversary hearing had not been held prior to the confiscation.

When Hatcher asked for a clarification of what was expected of the defendants at the hearing today, Reynolds was sworn in and took the stand.

Reynolds said that he had filed an application for the hearing with Judge Kelley [illegible] but was told not heard from the judge by the next day, he filed the application with Jones.

"All-Day War"

Reynolds said that Gem called him at 11 p.m. Tuesday and told him he (Gem) had declared "all-out war" on the D.A. Reynolds added, "I'm tired of being called a dictator and a censor."

Reynolds also said that Gem came to his office Monday and asked what the district attorney's feelings were on the film so he could tell his client.

Hatcher presented a motion for a continuance until Gem could be present, but the court denied the motion.

Hatcher explained his motion by saying that the defendants were informed of the hearing less than 24 hours before it was to be held, and they did not have time to call witnesses and collect evidence.

Give Conditions

Reynolds said he would agree to a continuance on the condition that the court be allowed to view the film, and that the movie be held until Gem could be present for a hearing.

The district attorney argued that if the theater owners were allowed a continuance and allowed to show the film, they would be interviewing viewers as potential witnesses. He added that one defendant owns a local radio station, and both have "great influence with the television station."

Hatcher said that the defendants would not waive their constitutional right to be free of prior restraint, and cited cases in Atlanta where movies continued to be shown while the courts conducted the hearings.

Reynolds said that "they want to continue showing it (the film), hoping that your honor will forget about it."

Denies Court's Power

Hatcher then presented another motion stating that City Court is without power to conduct such a hearing. Jones denied the motion, saying that if the court was empowered to sign search warrants then he felt it had the right to conduct the adversary hearing.

Hatcher told Jones that the defendants did not have the film present for showing today, and they did not intend to show the movie until the hearing ceased could be present.

Reynolds, still under oath, [illegible]

Carnal Knowledge' Placed Under Permanent Ban Here

2-10-72

By JAMES H. GRAY JR.
Herald Staff Writer

As far as the judiciary appears concerned, the movie "Carnal Knowledge" is permanently banned in Albany unless and until the owners of Broad Avenue Cinema get it lifted by some legal means.

Following a hearing in City Court here Wednesday before Judge Pro Hac Vice Allen T. Jones, the movie was seized at Broad Avenue Cinema Wednesday afternoon. Theater owners Billy Jenkins and Whit Woodall were charged with violation of Georgia's obscenity laws.

★ ★ ★ ★ ★ ★

'Sorry, Folks, The District Attorney Has Decided You Are Not Mature Enough to See . . .'

2-10-72

By VIC SMITH
Herald City Editor

The sign on the ticket window read: "The admission charge — contributions inside to help combat local prosecution."

A steady stream of persons — some young, some old, some bearded, long - haired and side - burned, some nude, some dressed, some black, some white, some hippies, some "straight" — moved quietly into the theater.

Another Try

It was nearly 2 p.m. on Wednesday, Feb. 9, 1972, and the scene was Broad Avenue Cinema, in the heart of downtown Albany. The occasion was another try — ostensibly the umpteenth try — to show the movie "Carnal Knowledge" to the general public.

It wasn't, of course, to be — courtesy of Mr. Robert Reynolds, Dougherty County District Attorney.

"Have the 'heavies' come yet?"

This was a question in the lobby of the theater shortly before the appointed time for showing the movie.

"No, but they'll be here."

A black man, but, predominantly, strolled in.

"How much," he asked theater co-owner Billy Jenkins, "do we put in the pot?" He referred to a cardboard box over which "censorship contributions" were being dropped.

"Anything You Want"

"Anything you want to," said Jenkins, as the box passed him. It was less the lobby. "You probably won't get to see all of it, anyway."

"Won't get to see all of it?"

"Probably not — I hope you do."

Without further comment, the man went inside and took a seat.

Then the time came for the showing. The signal was given, and a muted, almost full - house audience settled down a bit nervously.

On the screen came the preliminaries — producer, director, cast, etc., etc. Nothing happened.

Then the picture came on. And it went on, until just as the plot seemed to be developing. About 20 minutes after the start.

Screen Dark

Then, the screen went dark. The lights came on.

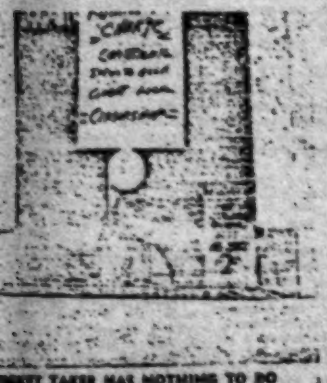
Jenkins stepped to the rear of the theater and said:

"Sorry, folks. The District Attorney has decided you are not mature enough to see this picture."

The crowd filed out, quietly, to mull about outside the building, watching and wondering.

Two County "investigators" — cops by any other name — appeared, carrying the film reels of the movie.

They invited Jenkins and co - owner Whit Woodall to accompany them to the sheriff's office. Jenkins and



...KET TAKER HAS NOTHING TO DO
...ge Encourages Combatting Censorship

AND AWAY IT GOES: Sheriff's investigator Wayne Parrish in... ing Broad Avenue Cinema with the film "Carnal Knowledge" in hand... watched without comment after the movie was seized Wednesday af... theater owners Billy Jenkins and Whit Woodall arrested. An attorney... of the film to a near-full house was interrupted after about 20 minute... (Herald Staff Photo by ...

'CARNAL KNOWLEDGE' TRIAL BEGINS HERE

A Dougherty Superior Court jury of one white woman, two black men and nine white men was struck by noon today to try the issue of whether the movie "Carnal Knowledge" is obscene.

In a surprise move just before the jury selection was completed, District Attorney Robert Reynolds elected not to prosecute one of the owners of the Grand Avenue Cinema, Walt Woodall. That left on the sole defendant the theater manager and operator, Billy Jenkins.

Reynolds' decision was designed to simplify the case and prevent the central issue to swirl around it simply as possible to the jury, in deciding whether or not Jenkins is guilty or innocent of "distributing obscene materials" by exhibiting the movie publicly, the jury will, in effect, decide whether "Carnal Knowledge" is obscene or not.

Show Made

The district attorney said that the movie would be shown to the jury this afternoon as part of the State's evidence.

In his exhaustive questioning of the jurors, leading defense counsel Peter Zack Geer endeared that the defense was prepared to introduce an "expert" to give his views on the film's intrinsic value.

Judge Ava D. Kelley, in givent the jury and court only a one-hour lunch break, promised that he would try to conclude the case today. It is expected to run into the evening hours.

Entering the uniformly dull questioning of each individual juror by the defense, which proceeded from 9:30 a.m. until shortly after noon, was the request of one male member

Carnal

(Continued from Page 1)

of the panel.

Geer inquired of the juror if he had "ever seen any scenes in movies that wouldn't be seen on the streets."

"That depends on what streets," came the laconic reply as the courtroom erupted into laughter.

Jenkins alone now faces the March term Grand Jury indictment that he "did knowingly exhibit a motion picture to the general public which contained conduct showing (a) an act of sexual intercourse; (b) a lewd exposure of the sexual organs; (c) a lewd appearance in a state of partial or complete nudity; (d) a lewd, sexual or indecent fondling of another person."

Central Issue

District Attorney Robert Reynolds, who led the film sound after it ran about 20 minutes at Grand Avenue Cinema here Feb. 9, said the central issue in today's case is a "jury determination of whether or not the movie 'Carnal Knowledge' is obscene within the meaning of Georgia statutes."

Prolonged questioning of prospective jurors revealed all of the normal shadings of the case, and there were frequent verbal clashes between chief defense counsel Peter Zack Geer and Reynolds.

One exchange provoked a stern admonition from presiding Judge Ava D. Kelley Jr., who warned there would be no conversations between opposing attorneys and that questions, differences and so forth would be directed to the bench.

Judge Firm

"I am not going to have any other procedure," the judge declared.

The judge at one time cautioned Geer concerning the attorney's "side remarks."

For the first hour and a half after court opened at 9 a.m. opposing counsel questioned prospective jurors at great length. Geer was particularly detailed in his examinations, asking if the jurors had seen "Carnal Knowledge," querying them as to church affiliations, and as to whether or not they had made up their minds about the movie on their "personal opinions" or if they would decide the case on its merits under Georgia law, which would be given to them in charge by the court.

Geer's Questions

Geer wanted to know if jurors would "view certain scenes of the movie as overriding factors" in their judgment, or whether they would judge the movie in the light of its "whole thrust," or "total impact."

During the questioning, three women were excused "for cause." They had seen the film. One elderly man was excused because of deafness.

One woman who had seen the picture said that it "offended" her all the way through the showing. She said it "had no message," or that if it had it was a "negative message." The language used in "Carnal Knowledge" made her "feel uncomfortable," she said.

11-to-1 Split Holds Firm

'Carnal Knowledge' Jury Deadlock Sparks Mistrial

By JIMMY ROBINSON
Herald Executive Editor

3-31-72

A mistrial was decided at 12:15 p.m. today by Dougherty Superior Court Judge Ann D. Kelley Jr. after jury which deliberated for more than eight hours Monday and today reported itself deadlocked at 11-to-1 in the "Carnal Knowledge" case.

The issue which the jury failed to resolve was the guilt or innocence of Broad Avenue Cinema Manager Billy Jenkins, charged with "distributing obscene material" in exhibiting the Ronald Ellis that constitutes an artistic commentary on the American concept of sex.

Hanging Five

But the deeper issue still hanging fire is whether "Carnal Knowledge" is obscene within the meaning of the 1971 act of the Georgia General Assembly.

Monday's trial, pressed to completion by Judge Kelley, required 10 hours. The jury first reported its 11-to-1 deadlock before 11 p.m., and this morning shortly before 11 o'clock, advised the court that it still could not make a verdict.

Finally, just before court recessed for lunch, Judge Kelley declared a mistrial after Foreman Jack Thomas reported the 11-to-1 deadlock had not been broken.

May Trial Soon

District Attorney Robert W. Reynolds, who three hours has named "Carnal Knowledge" in Albany, said in the wake of the mistrial declaration that he would not a new trial in the May term of court.

It is also city in Georgia, or anywhere else in the United States, has the movie been the basis of any legal action.

The showpiece of the State's case was the movie itself.

To view it, the entire court retired to the Broad Avenue Cinema, from which "Carnal Knowledge" was taken seized by District Attorney Reynolds in January and February.

BULLETIN

District Attorney Robert Reynolds announced after noon today that a retrial of the "Carnal Knowledge" movie case would begin Wednesday morning at 9 a.m. Previously Reynolds had said he would retry the case during the May term of Dougherty Superior Court.

It was the first time that he had so moved his court, Judge Kelley remarked, wistfully recalling that the theater was the scene of his boyhood viewing of the deeds of derring-do of the likes of Tom Mix, Hoot Gibson, Ken Maynard, Buck Jones et al of the Western pantheon of sun-parcels.

Jury Sequestered

By court order, the jury was strictly sequestered in the theater. Other court personnel, the press and those in attendance as spectators at court, were kept at least five rows from the jury, and deputies had strict orders from the court to arrest anyone seen approaching a juror for any purpose. None did.

Following the showing, which provided a welcome two-hour stroll in the sunshine for the jury and the court, the State tendered the film in evidence. And that was its entire case, except for the testimony of Sheriff's Investigator Lynn Wood, who related how he made four arrests at the Broad Avenue Cinema and seized the two reels of film of "Carnal Knowledge" last Jan. 13. The grand jury indictment was based on this incident, not a later seizure Feb. 8.

Three Witnesses

The defense had but three witnesses, Mrs. Jean Daugherty, a ticket seller for the theater, who told of buying Playboy and other magazines featuring broad expanses of nude feminine flesh; Terry Kay, motion picture critic of the Atlanta Journal, and the defendant himself.

Defense counsel Geer, through the use of Mrs. Daugherty, said he desired to show "community standards" in Albany as defined by the Georgia Code. District Attorney Reynolds objected strenuously, and after lengthy arguments, the objection was overruled. After that, Mrs. Daugherty testified to buying Night and Day, Flesh, Stare, Penny and National Star Chronicle at City News Stand, whereupon Geer then introduced in evidence a box full of "girlie" magazines without objection from the State.

Geer Overruled

Under cross-examination, when Reynolds attempted to show scenes from such motion pictures as "Tobacco Road" and "Southern Comfort" and "Sweet Bird of Appetite" and "Midnight Phoning" to the witness, Geer objected immediately, but the court ruled that the district attorney had an equal right to inquire about community standards. However, Mrs. Daugherty testified she had seen none of the films in question.

Kay, testifying as an "expert" in his field after an exhaustive legal bout between attorneys, said that "Carnal Knowledge" depicted the destruction of personalities, in one case due to a change of philosophy of an individual. The movie, he said, was a "study in contrasts," and that to him had engendered a "great feeling of disgust." The moral of the movie, Kay said, was that "sexual depravity leaves man without any values." The movie "disgusts more than it arouses," he testified, and "destroys the myth of sex" as the be-all and end-all of American society as depicted in so much of the modern advertising."

Jenkins Statement

In his unsworn statement to the jury, permitted under Georgia law, Jenkins said that in 20 years in the theater business, he had played all types of movies and cited a change in the audience appeal of films in general. He said he had no knowledge that "Carnal Knowledge" was obscene, that it ranked among the 20 best films of last year, that star Ann-Margret had been nominated for an "Oscar," and that the film had played in 20 other Georgia cities without any legal incident whatsoever. Among those he listed Columbus, Valdosta, Douglas, Moree, Savannah, Statesboro, Augusta, Dalton, Cedartown, Atlanta, Rome and others. It is booked in Candler March 31, he said.

Following the close of testimony, Geer moved for a directed verdict on behalf of his client, chiefly on the grounds that no evidence had been introduced that Jenkins actually had exhibited the movie, but this was easily overruled by Judge Kelley.

The heart of both the prosecution and defense lay in the often perfervid arguments of the opposing counsel in their closing summations.

"Slap" of Art

Reynolds said he was "glad" the 1971 act was on the Georgia lawbooks and pledged to enforce it to the best of his ability. He said he had long been "trying to get a ruling from a jury on what kind of community standards we are going to have in Albany." He told the jury: "You ought to stop it (obscenity) in this county," adding, "We're going to stop it this community what we can't do out in front of this Courthouse."

Disclaiming any "personal interest in this verdict," the district attorney said that "later on if this community wants to do something about that (a reference to the girlie magazines), I'm ready."

He scored the defense contention that "Carnal Knowledge" had "redeeming social value" as required both by a U.S. Supreme Court decision and by Georgia law, and cited its effect on 16-year-olds in particular. Answering a defense contention that a banning of "Carnal Knowledge" had made Albany "the laughing-stock of the nation," Reynolds said the jury: "Be the laughing - stock but stand up for your convictions."

The purpose of movies like "Carnal Knowledge," the district attorney declared, "is to draw youth like a magnet to love the almighty dollar." This, he concluded, was "a landmark case" and the jury's verdict would provide "a guideline for the future" in Albany.

Geer Summation

Geer, in his summation, said he had "seen women walking on Pine Avenue right out yonder without bras and in hot pants, but I didn't go out to the TV station and make a speech about it; it's not any of my damned business. I don't like it, but it's your community standard."

He stressed that "Carnal Knowledge" did not feature any "belly dancing, but you can go to Joe Peach's a lot of nights and see that." Peach is operator of Joe's Cellar, a local night spot.

Summoning his finest hermetic flourishes, Geer thundered: "You can't legislate morals; neither the United States Congress nor the Georgia General Assembly can do that. You only get morality from inside of yourself."

He strongly suggested that "Carnal Knowledge" was comparable to a medieval morality play, and said that the movie appeals not to "prurient interest" — another Supreme Court definition — but rather precipitates an almost universal disgust.

Civil Rights

Even so, he said that "people have a right to see this movie; it is one of our basic freedoms in the Constitution . . . The freedom of expression today is on film; people don't bother to read any more."

Finally, Geer said it is the test that Albany alone among the cities of the entire country has

The Albany Herald

City Life

In Greater Albany

Second Film Trial Opens

1-23-72

The federal movie "Carnal Knowledge" had its second day in Dougherty Superior Court today -- the second this week. And it.

The first trial of the State's defense motion to have the of Georgia vs. Billy Jenkins, "Carnal Knowledge" jury taken president and manager of Bond to see "Each Good Friends" at Avenue Cinema, charged with le Martin Twin Theater. "distributing obscene material," ended in a mistrial yesterday.

However, defense counsel Grier said he hoped to introduce in evidence the testimony of witnesses who had viewed "Each Good Friends." He said his object would be to set forth "community standards" which the U. S. Supreme Court has ruled is one of the criteria al- owing "obscenity" decisions.

Prosecutor Rodney

The jury, which took the case early Monday night after a 30- hour trial, reported itself deadlocked at 11 to 1 by 11 p.m. Monday, advised the court in mid-morning Tuesday that it had not changed, and finally was dismissed with a mistrial declaration by Judge Asa D. Kelley Jr. at 12:15 p.m. yesterday.

Reportedly, the majority favored conviction, a verdict which would have had the effect of ruling the movie "obscene" within the definition of a 1971 act of the Georgia General Assembly.

The retrial of the case was scheduled suddenly yesterday afternoon when, District Attorney Reynolds told The Herald, defense counsel Peter Zack Geer agreed with the D. A. that the earlier the issue is settled, the better.

By 10:30 a.m. today, a jury had been struck -- this ten alternate, with 10 whites and two blacks.

The "Good Friends"

The defense failed in an effort to subpoena the X-rated movie, "Each Good Friends," starring Dyan Cannon and now appearing at Martin Twin Theater. Judge Kelley ruled that a defense subpoena, issued late yesterday, did not provide sufficient time.

The judge also ruled against

After an early lunch today, the new "Carnal Knowledge" jury trekked to the Bond Avenue Cinema to see the showing of the film as the State's prize exhibit.

Presumably, too, Judge Kelley, who praised opposing counsel for a conclusion of the trial in one day Monday, even including a 30-35 recess which kept the jurors in court more than 12½ hours, would do so again today.

Second Jury Finds Movie Carnal Knowledge Obscene

3-24-72

By JAMES H. GRAY JR.
Herald Staff Writer

A Dougherty Superior Court all-male jury Thursday finally returned a guilty verdict in the case of Billy Jenkins president and manager of the Bond Avenue Cinema, charged with "distributing obscene material".

Jenkins was fined $750 and ordered to one year on probation by Dougherty Superior Court Judge Ann D. Kelley Jr. for showing the nationally-released R-rated movie "Carnal Knowledge" at his theatre.

Defense Attorney Peter Zack Geer charged that the proceedings constituted another "Keystone Monkey Trial" and that the decision was a "disgrace to the back of freedom in Dougherty County."

Intends to Appeal

Geer added that he was dissatisfied with the verdict and intends to appeal the conviction to the Georgia Supreme Court.

The attorney said that "supposedly the jury missed the whole point about freedoms guaranteed under the First Amendment" and that as far as he could tell "District Attorney Bristol, Ogeechee, never thought the First Amendment was involved."

Geer cited a Supreme Court ruling which held that "nudity and naked men is not obscene," here maintained. In their decision that "obscenity is in the eye of the beholder."

Second Jury

The second jury to hear the case and charged by Judge Kelley to return a verdict deliberated nearly 24 hours before reaching a decision. They reported themselves deadlocked at 7-5, then 9-3, and 11-1 before returning the guilty verdict.

Another jury had considered the case for nearly four 24 hours, Monday and Tuesday before reporting itself hopelessly deadlocked at 11-1.

Republic had no comment on the outcome of the trial.

APPENDIX P

Page

State Statutory Standards
Dealing with Offenses Against
Morality and Decency
Arranged by State and Topic..... 2-16

OBSCENITY	LEWDNESS	INDECENCY Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	Pander Pim
					ALABAMA					
Title 14 Chapter 84 14-370, et seq. Seizure, Presump. 14-374 (2) Obscene defined: "...lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." 14-374 (1)	7-1981	Exposure: 14-326 (1) Enticing child for immoral purposes 14-326 (3)	Nude Pictures 14-374	Equity Action 14-374 (5) Obscenity: Injunc. 14-374 (7) Nuisance: "lewdness, assignation or prostitution" 7-1981	Before Women 14-11	14-16	14-16	14-336	14-323 et seq.	14-331 et seq. Pandering 14-330
					ALASKA					
Const. Books 11.40.370	Incest children 11.15.134	Exposure: 11.40.100 Contrib. to delinq. of child 11.40.110 Delinq: "immoral..., obscene,... vulgar.... indecent,... 11.40.150 Incorrect genic laws 11.40.170			Solicitous: 11.45.035	11.40.060 et seq.	11.40.040	11.40.120	11.40.130	11.15.130 et seq. 11.15.134 et seq.
Defn: "Sexually indecent...adultery, homosex., sodom., masochism, perversions, lewd, lascivious, suggestive, amorous nakedness, intimate sex. insects or animals exposed" 11.40.170 (6)										
					ARIZONA					
13-531 et seq., Minors 13-535 Many Related 13-601.01 Obscene defined: "that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interest in nudity, sex or lewdness going substantially beyond customary limits of candor in description or representation of such matters and is utterly without redeeming social importance." 13-531.01	13-651 et seq. 13-652 13-901 et seq.	Same obscenity	Motion picture depicting nudity banned 13-536	Nuisance: "indecent or offensive to senses" 13-601 Obscenity: Injunction 13-535	Language 13-377 Obscene song: 13-378 Solicitation 13-699	13-221 et seq. Incestuous Adultery 13-471	Open and notorious 13-322	13-651 13-652	13-471 25-101	13-10 et seq. Pandering 13-535 13-10 et seq.
					ARKANSAS					
41-2719 et seq., 41-2701 et seq. Defn: "obscene, vulgar, indecent" 41-2704 "matter of utter...nature to the person" 41-2704 Minister persuas.: 41-2727 Sale to minors 41-2722 Obscene defined: "If, the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 41-2701 (1)	Same obscenity	Exposure: 41-2711 Indecency: 41-2701 Before children 41-2127	Nuisance: 47-2709 et seq. "public exhibition of nudity" 41-2711 "private parts exposed or in service of others" 41-2709	Injunc. 41-2721 41-2719 Action in Chancery Court. 41-2717 Nuisance, equity cases 34-101 et seq.	41-1408	Divorce grounds 34-1212	Charge of, in slander 41-2457	41-813 41-814	41-811 13-102 et seq.	41-120 et seq. Pandering 41-207

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					CALIFORNIA					
Penal Code §§ et seq. Arrest records of persons of juvenile, minors or inmates having place PC 851.5	PC 311, 311 1/2 PC 11225 et seq. Registration of offenders PC 290	Obscene live conduct PC 311.6 Acts encouraging obscenity PC 650 1/2 Indecent Exposure PC 314 Indec. Exhibition... children participating Lab 1308	Topless waitresses and entertainers Penal Code See obscenity, PC 311 (a)	Nuisance: "lewdness, assignation or prostitution...." PC 11225 Nuisance: "indecent or offensive to the senses." CC 3479 Public nuisance: "indecent" CCP 731	Vulgar, profane or indecent PC 415 same 311.6	PC 269a 269b	Cohabitation PC 269a 269b	PC 286 288 A	PC 285	Penal Code 647 Nuisance PC 11225
Obscene defined:	"when as a whole, the predominate appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." PC 311 (a)									
					COLORADO					
40-9-18 et seq. Nuisance against D.A. 16-9-21	40-9-15 (see indecency)	Indecent liberties 40-9-32 Lewd display or monstrous act of public indecency 40-9-15		Nuisance: "lewdness, assignation, or prostitution" 38-13-2 Injunction: 40-9-22 40-7-105		40-9-1 et seq. 40-6-501	40-9-3 40-9-15	Loss of civil rights 39-10-10	40-9-4 et seq. Disqual. for civil rights 39-10-10	40-9-15
Obscene defined:	"means...lewd, or indecent, or lascivious...or other representation..., of an immoral or indecent nature...pictures of men or women in unnatural attitudes or positions...indecent or immoral details of crime, vice, or immorality, to corrupt public morals, or to offend common decency...or to make ...immorality and licentiousness attractive..." 40-9-17									
					CONNECTICUT					
53a-193 et seq. Minors 53a-196 Material harmful to minors 53a-197 Obscene defined:	53-185 et seq.	53a-82 et seq.	Nudity defined: 53a-193 (2) See obscenity defn. 53a-193	Nuisance: "lewdness, assignation, or prostitution" 19-335 Obscenity: Injunction 53a-196 53a-200	(repealed)	53a-81	(repealed)	Penal Code 76 et seq.	53a-291	Penal Code 83 et seq.
"...(1) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, (2) it goes substantially beyond customary limits of candor in describing or representing such matters, and (3) it is utterly without redeeming social value." 53a-193										
					DELAWARE					
11-711 et seq. Minors 11-636 et seq.	Defined 11-731		Nudity defined: 11-4100 (e)	"social vices" Nuisance: 10-7111 et seq. Nuisance: "lewdness, assignation, or prostitution" 11-7107 Obscenity: Restraining order in Chancery 10-439 a		11-171 11-531 11-821 Custody of Rus. issued by. 13-744	11-531 11-821 832		11-531 24-1799	11-731 et seq. 10-7101
Obscene defined:	"...horror, lewd, lascivious, filthy, shameful...or obstruction of decency in manner or purpose..." 11-711									

OBSCENITY	LEWDNESS	INDECENCY Indec. Ex.	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTE
				DISTRICT OF COLUMBIA						
22-2001 et seq. 47-2351 Obscene defined:	22-2713 Lewd, indecent or obscene acts 22-1112 Nuisance 22-2713	22-1112	Not searched	Nuisance "lewdness, assignation or prostitution 22-2713		22-301			22-1901	22-2701 et seq. Nuisance 22-2713
				FLORIDA						
847.011 et seq. Nuisance: 823.05 Minors: 847.013 Exterior Presentation 847.011 (1) (b) Obscene defined:	Defined: 796.07 847.011 Children and minors 847.012 .013 License revocation, seizure of 870.10	Exposure: 800.02 .03	Nudity defined: 847.013 (a)	Obscenity: Exhibition: 847.011 (1) (a) Nuisance: "injurious to the morals, prostitution, assignation, lewdness, games of chance... 823.05 Obscenity: Exhibition: 847.011 (1) (a) Pre-emption of legislature 847.011	847.05 Penal code: 231.28 Open profanity 847.04 Indecent language 345.10	798.01 798.04	798.03 .04 Female children and minors 794.05 .06	800.01 .02	741.23	796.07 et seq. 823.05 Nuisance 96.1 et seq. Exterior Pre. 847.011 (1) (b)
	"...obscene, lewd, lascivious, filthy, indecent, sadistic, or masochistic..." 847.011 (1) (a)									
				GEORGIA						
26-2101 et seq. Minors 26-9905a Pandering as separate crime 26-2101 (4)	26-2011	Public indecency 26-2011 Indec. Ex. children dressed at for 14-9911 99 Disbarment of attorney for 9-911 Entering child for indec. purposes 26-2029	Nudity or sexual conduct, material depicting 26-2102 See obscene, definition 26-2101 (b)	Nuisance: "...tends greatly to corrupt the manners and ... morals of... the people" 72-2-1 Crime is criticizable as a nuisance 72-9901	26-2012 May modify assault 26-1306	26-2009	26-2010	26-5901 et seq.	26-2008	26-202 et seq. 27-304 41-10 16-6901 Lewd loose 72-101 Nuisance 72-101 Prostitution, exhibitions of body by prostitutes 26-4201
Obscene defined: "...if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, an interest without redeeming social value and, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." 26-2101 (a)										
				HAWAII						
727-8 et seq. Public shows 141-889 Obscene defined: 727-8	709-1 727-1 et seq. Lascivious conduct 709-1	Indecency (1)		Nuisance: decree ...Hawaiians "...obscene, lewd, lascivious, filthy, indecent, or ...exposure... ...basis in the customs of the people..." 727-8	711-1 -2	704-11 et seq.	704-15 et seq.	704-61 et seq.	704-11	711-1 et seq. Lewdness 711-1
Obscene defined: "...exhibition, lewd, lascivious, filthy, indecent, or sadistic nature, or the dissemination of which consists of pictures or shows of lust or sex, or which tends to corrupt the morals of the citizens of the nation, or of certain sensibility..." 727-8										

					IDAHO					

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	SEXUAL HYPERBOLE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PERVERTION
					ARIZONA					
13-3.1 et seq. Minors 13-3	13-1 et seq. Lewd act in presence of child carrying penalty of minimum 13-1.2, .3	Exposure 13-1.1		Nuisance "...obscene..." 13-7.1	Profane and indecent 13-3.1	13-1.1	violation... cohabitation 13-1.1	13-1.1, .2	13-1.1	13-1 et seq.
Obscene defined: "...obscene, indecent, immoral, or impure...which would tend to the corruption of the morals of youth or others..." 13-3 [illegible] play, exhibition, show or entertainment) . "...obscene, lewd, indecent, lascivious, or filthy...or article of indecent or immoral use." 13-1 (book, pamphlet, picture, writing or instrument).										
					ARKANSAS					
41-4301 Minors 41-4301 e	Lewd and lascivious behavior; "sexual intercourse... being viewed ...or the unclothed genitals of a man when..." 41-3608	Exposure 41-3609	Sex crimes definition 41-4301 (2) (a)	"Indecent books" 41-4311	In films 41-112 Quarantined 4970 telephone 41-4113	41-3607	41-308 41-310 Homeland	41-3601 aggravated sodomy 41-3606	41-301	41-302 et seq.
Obscene defined: "...considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sado-masochism, and the material is patently offensive and clearly without redeeming social value..." 41-4301 (2) (a)										
					KENTUCKY					
436.060 et seq. Minors 436.201 (1) et seq. and 436.040 et seq. Public, Federal areas 436.200 See alternate agencies available" Minors can in comic books 436.040 et seq.	436.070 Exhibiting matter, sale or bail 436.070	Exposure lighting your 436.080 Indecent practices 431.100 (prescribed 4970)	"Nudity" See obscenity definition 436.101 (a)	Suggestive, obscene matter 436.070	86.170 telephone 436.107 exposing police nursing 431.060 436.150 book 377.060 437.000	436.070	436.070	Sodomy buggery 436.060	436.060	436.060 436.01 Incest 436.03
Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter taken as a whole is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 436.101 (1)										
					LOUISIANA Civil Statutes Are Same					
14.106 Minors 14:91.11 14:92.2 Pre-emption of regulation 14:91.2	Disorderly conduct 14:103 Cohab. of minors 13:351	Cruelty to Juveniles "place where sexuality indecent and impure obscene...is allowed..." prohibited" 14:92 Indecent behavior 14:81 Public morals 14:283 et seq.	Nudity defined: 14:92.2 A (3)	Obscenity, Nuisance "exaggeration, perversion or obscenity" 13:4781	14:82 telephone 14:285 45:1966 Language or gestures 14:103		(Indexed under other topics)	14:89	14:78	14:89 14:79
Obscene defined: "(2) Exposure of one's person in a public place...that one might see it or view...by another...with the intent of arousing sexual desire. (3) Production [of matter]...with the intent to primarily appeal to the prurient interest...of any kind, lascivious, filthy or sexually impure [sense]...(5)...any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movements..." 14:106 A										

	LEWDNESS	INDECENCY (Subsec. No.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					MAINE					
17-2001 et seq. 17-2101 17-2301	17-3851	17-301	Nudity defined: 9-609	Nuisance: "Places reputed to be houses" 17-2701	Indecent language publicly and offensive language 17-452	17-101	17-1151	17-1001	17-1501	17-3051
17-2501 et seq.	Obscene defined: "...illustrations of ...indecent, immoralities, sexual perversion, immodesty or lust, or obscenity, indecency or immodesty..." 17-2501									
					MARYLAND					
27-27 et seq.	Defined 27-35	Indecent exposure 27-122	Nudity prosecuted and defined 27-416 A-D Nudity and sexual displays 27-416A	Nuisances: obscenities; equity and equity 27-416 A	Profanity cursing in streets 27-121 Blasphemy 27-12 Telephone 27-555A	For divorce 10-24	Adultery for divorce, 27-1	27-343 534	27-535 550 560	27-1 et seq. 27-121 429 430 431 575
27-403 et seq. 27-415 et seq. 27-439 et seq. 27-440 et seq. 27-447 et seq.	"...lewdness..." 27-416 Held to give adequate warning of the conduct proscribed and to mark boundaries sufficiently definite for judges and juries fairly to administer the law. Levin v. State, 1 Md. App. 230, 228 A. 2d 587 (1967).)									
					MASSACHUSETTS					
Ann. Laws ch. 272, sections 16-28	General Statutes: "Lewd, obscene, indecent or impure shows ...or tending to corrupt the morals of youth..." 272-31 33 Abortion and inducements 272-19 Incest and incestuous persons 272-13	Indecent Exposure 272-53 Devices for indecent purposes 272-21	Nudity: See discussion of definition 272-30 (par. 3)	Obscenity, persons in equity 272-28C Nuisance "prostitution, assignation or lewdness" 139-4	Profane obscene threats Imagery 272-31 Blasphemy 272-34 Obscene language at sporting events 272-34A Arrest for using 272-53 Telephone 260-14A	272-14 et seq.	272-15 et seq.	272-34 Dissolved and incestuous unions 272-36 35A 272-45	272-17	272-53 et seq. Nuisance 139-4
	"...obscene, indecent or impure..." 272-28A									
Crimes in Minn. Stat. Ann.	Crimes defined: "...obscene, indecent or impure, harmful to minors, or manifestly tends to corrupt the morals of youth..." "...harmful to minors" means "...representation of nudity, sexual conduct or sexual excitement which appeals predominantly to the prurient, shameful or morbid interest of minors under eighteen years of age, is patently contrary to prevailing standards of adults in the community as to suitable material for such minors, and is utterly without redeeming social importance for such minors." 272-28									
					MICHIGAN					
Penal Code 31.171 et seq. 30.2000 et seq. Minn. 34.171 (1) Chemically operated 16.2000 Prostitution 34.171 (2)	Gross lewdness and incestuous behavior 30.547 Transvestism 30.570	Exposure 30.567 (1) City power 5.1760 Gross indecency 30.570 (2) Inhabitation of children 30.315	Nudist camps, regulation 7.351 (2a)	Village powers 5.1255 5.1332 Nuisances: 30.560	Indecent language in presence of women and children 30.560 "Lewdness, assignation, prostitution, cursing, gravations, disorderly persons, illegal narcotic drugs, illegal liquor..." 27A.3001 Chemically Dependent: "...obscene, lewd, incestuous, filthy, indecent, or disgusting, or...indulgence of indecent or unusual sex..." 27A.2930	30.310 339	Lewd and incestuous cohabitation 30.567	30.351 356	30.565	30.131 .345 (1) .600 .703 .717 .1305 .1805 Nuisances 27A.3001
	Crimes defined: 1. "...obscene, lewd, incestuous, filthy or indecent, salacious or scandalous..." 2. Test to be applied: "...the effect of the [material]...considered as a whole...upon the average person in the community....judged...by the standards of common conscience of the community of the contemporary period of the violation [charged]." 3. "...portrayal...of sexual sex, or sexual relations...of perversion, lust or sexual passion...." 1. 30.571 (1); 2. 30.571 (2); 3. 30.571 (3)									

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	OBJECT	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					MISDUCT					
827.240 et seq. Minors 827.255 Village power to restrain 822.230	gross lewdness and boisterous behavior 827.11	Local ordinance 827.11 Indecent exhibition 827.11 .251	Nudity defined 827.252 (3) Nudity (minor) 827.253 (a)	Obscenity: Village power to restrain and punish 822.230 Obscenity Public Nuisance 600.74	Language provocative of assault 865.10 telephone 934.74	827.16 (repealed)	827.16 (repealed)	800.253 Mandatory 800.254	827.13	827.10 et seq. Repealed
Cha-costly is hostile to obscene appeal used to arouse commercial exploits. 827.291 Bubble-X										
Minors parties raising system, cont. 827.257										
Obscene defined: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 827.240										
					MISDUCT					
11-3270-01 et seq. Minimum penalties and dispositi 11-3270-08 Exposed 11-3270-10 equity rules in procedure 11-3270-06 Inverse prosecution 3270-15	Medium or lack in public view 30-2232	"private party" exposure 11-3290 Obscene indecent sexual exhibitions 11-3286		Nuisance "lewdness, exhibitionism or prostitution" 11-3260 Obscenity as/and 11-3274-10 Obscenity action in Chancery ct. 11-3274-04 rules of civil procedure pertaining to equity cases are applicable 11-3270-06	"Profanity coarse or curse...use vulgar and indecent language..." 11-3291 telephone 11-3291.1	11-3260 et seq.	11-3260 et seq.	Sex re-exercised	11-317 450	11-310 4 seq. Exposure 11-280
Obscene defined: "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 3270-02										
					MISDUCT					
943.270 et seq. Search and seizure 942.180 et seq. 943.290 Minors 943.250 Exposed 943.201	943.450 943.250	Exposure to minors 943.250 Exposure 943.250		Obscenity enjoined 943.285	Vulgar obscene or indecent pleadings in newspaper 943.290	943.250		943.230	Infamy 943.220	943.30 et seq. Exposure "Body Heats" 943.230
Obscene defined: 1. "...through mainly in...novelists, whippings, bribery, assignations, intrigues between lust and vagrant and immoral conduct of persons..." 943.270; 2. "...obscene, lewd, licentious, indecent or lascivious...or other publication of indecent, immoral or scandalous character...or publish in any newspaper any vulgar, scandalous, obscene or immoral pleadings or evidence..." 943.290										
					MONTANA					
94-3601 et seq. Minors enforcement 94-3601 94-3611 94-3613	Lewdness 94-3602	Indecent exposure 94-3603 "private parts"		Nuisance: "indecent or offensive to senses" 17-101 93-2603 94-3601 et seq. 17-101 17-121	Using loud or obscene or vulgar or words 94-3603 (3)	94-4107	94-4107	94-409 94-410	46-101 94-705	94-3607 et seq. Exposure 94-3603
Minors defined: "Lewdness, exposition, prostitution, gambling, [illegal] sale [illegal] marriages), or other illegal acts prohibited in title 94 chapters 24 and 35." 94-3601										
Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 94-3601										

CRIMES	LEWDNESS	INDECENCY (Lewd, Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					NEVADA					
200.010 et seq. Homicide generally; when justifiable or excusable 200.120 et seq. Death defined 200.580 Person defined 193.130	201.190	Indecent exposure 201.220		Obscenity injunction 40.010, 40.020, 40.040 Nuisance defined 244.360 Offensive water nuisance 244.365 Nuisances "Lewdness, assignation, or prostitution" 244.360 Person defined "...obscene, lewd, indecent, or lascivious..." 201.235	In presence of female 200.510 Defined 200.515 Child use 432.240	201.190	Seduction and fornication 201.540 201.550	201.190	201.180 et seq.	201.430 et seq. Injunction 40.140
					KENDA					
201.190 et seq. Homicide when justifiable 200.120 Person 200.590	Open and gross lewdness 201.210 Depravation of sex offenders 207.151 et seq.	Indecent exposure 201.220 Exhibition of "obscene indecent or immoral" show 201.253 Employment for indecent exhib. 609.210	Nudist colonies 644.070 Nudity defined 201.261 Nudity (minors) 201.265 (1) Nudity: see obscenity definition 201.250 (2) (b)	Public nuisance 202.450 .480 City power 266.350 Obscenity injunction 201.250 (4) (b)	Obscene calls, telephone 201.255	Grounds for divorce 125.010	(see sexual intercourse)	201.190	201.180	Advertising prostitution forbidden 201.430 et seq. Pandering 201.300
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest or a shameful or morbid interest in nudity, sex or lewdness going substantially beyond customary limits of candor or description or representation of such matters." 201.235 (2) (b)										
					NEW HAMPSHIRE					
570:1 et seq. City's power to punish 47:17	570:1 et seq. 570:15	Indecent exposure 570:4 Indecent conduct 570:33 et seq.		Nuisances: "lewdness, assignation, or prostitution" 544:1 Removal purposes chap. 544 Offensive businesses 147:35	Lascivious speech 570:25 570:2 :3 Offenses against morality 570:2 telephone 572:39-b 571:14	570:1 :2	570:4	570:9	570:7 457:1 et seq.	570:14 et seq. Nuisance 540:1 570:19
Obscene defined: "...obscene or lewd or lascivious..." 570:14										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					NEW JERSEY					
2A:115-1 et seq. Pandering 2A:115-1,2 To minors 2A:115-1,3 115-3.3	Cases involving sex or sexitious acts... Acts tending to debauch morals 2A:169-1	Exposure 2A:115-1 Indecencies in publication 2A:115-3		Nuisance: "gather...for purpose of gratifying themselves" 2A:130-2 110 N.J.L. 381 Municipal power 40:72-3 Obscenity injunction 2A:115-3.5 Nuisance: "prostitution, lewdness, or assignation"	2A:140-2 Indecent communications to female 2A:115-4	2A:56-7 2A:89-1	2A:110-1	2A:143-1 -2	2A:114-1 et seq.	2A:115-1 et seq.
Obscene comic books "...basic factor in impairing the ethical and moral development of our youth and constitute a clear and present danger to the people of the State." 2A:115-3.3 Prompt judgment 2A:115-3.6								Abominable and detestable crime against nature 2A:139-2		

Obscenity:
1. Legislative findings: "The Legislature finds that the standards of obscenity now enunciated in chapter 115 of Title 2A of the New Jersey Statutes as amended and supplemental in recent years is unnecessarily permissive and a hindrance to effective legal action against obscene matter. The Legislature further finds that such unnecessary permissiveness has resulted from the incorporation into New Jersey Statutes of language from influential opinions authored by certain United States Supreme Court justices; which language, however, does not represent binding majority decisions of the Supreme Court and, accordingly, need not bind the Legislature or the judiciary of this State." 2A:115-1.b

2. Obscene defined: "...that which to the average person, applying contemporary community standards, when considered as a whole, has as its dominant theme or purpose an appeal to prurient interest." 2A:115-1.1

					NEW MEXICO					
Power of municipalities to suppress 14-23-12 14-17-14		Exposure 40A-9-4		Nuisance: "injurious to public... morals..." 40A-8-1		40A-10-3		40A-9-4	40A-10-3	40A-9-1 et seq.
					NEW YORK					
Penal Code 235.00 et seq. Injunctive proceedings PC 235.10 PC 235.12 to remove PC 235.20 PC 235. 22 Action: Posture (Exhr. 232-a Seizure and forfeiture Penal 470.20		Indecent exhibitions Exhr 232-a As fairs or expositions Agric. and M 188 revocation of license for, vehicle and T 396 Indecency injunction Crim 23-a	Nudity defined PC 235.20 (3)	Obscenity injunction CPLR 6330 Obscenity town's power to prohibit Town 130 (11) Nuisance: "lewdness, assignation, or prostitution" Pub H 2320	Obscene gestures or lang. Penal Code 240.20 Abusive or obscene language in public Penal 240.25	Penal Code 255.17		Penal Code 130.00	Penal Code 255.25	Penal Code 230.00 et seq. words, &c. as nuisance Pub H 2320 et seq. loss of beverage license Alc Bev. Ch. Appendix 54.10

Obscenity
1. Constitution. (Liberty of conscience not to excuse acts of licentiousness.) Const art 1, Sec.3
2. Obscene defined: "...(a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value." Penal Code 235.00

					NORTH CAROLINA					
14-190.1 et seq. to minors 14-190.7 190.8 Adversary proceedings 14-190.2 & injunction	Lewd women within three miles of college 14-188	Indecent exposure 14-190.9 Indecent exposure, sexual shows 14-190	(see Intent)	Nuisance: "lewdness, assignation, prostitution, gambling, or illegal sale of whiskey or narcotic drugs" 19-1 et seq.	Profane or indecent language 14 -196 telephone 14-196 profane or obscene language on highways 14-197	14-184	14-184	14-177	14-178 179	14-180 et seq. Seduction 14-27 Nuisance 19-1
					Obscenity injunction 14-190.1					

Obscene defined: "...(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and, (2) the material is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters; and, (3) the material is utterly without redeeming social value; and, (4) the material so used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina." 14-190.1 (b)

Statute	Lewdness	Indecency (Subsc. Dr.)	Nudity	Moral Interest	Obscene Language	Adultery	Fornication	Sodomy	Incest	Prostitution
					NORTH DAKOTA					
12-21-0 et seq.	Lewdness unlawful 12-21-1(2)	Indecent exposure 12-21-10		Voluntary "...attempts Lewdness..." 12-21-03 et seq.	Obscene language 12-21-03 et seq.	12-21-02 et seq.	12-21-09	12-21-07	12-21-06	12-21-04 et seq.
	"Lewdness shall include any indecent or obscene act" 12-21-1(2)	Carnivals, indecent shows 12-21-09			Blasphemy 12-21-01		Unlawful cohabitation 12-21-12			Promoting prostitution 12-21-07
	Lewdness indecent 12-21-10	Producing indecent material 12-21-10								
		Shows for indecent purposes 12-21-21								
		"Act which openly outrages public decency and is injurious to public morals" misdemeanor 12-21-02								
Other Statutes	"...obscene, lewd, salacious or lascivious...or other matter of indecent character..." 12-21-07									
					OHIO					
2907.31 et seq.	Definitions Lewd picture in Ohio 2907.41	Indecent exposure 2907.09 Giving immoral exhibition 2907.40	Nudity defined 2907.34 Nudism prohibited 2907.31	Voluntary "Lewdness, assignation, or prostitution...lewd, indecent, lascivious or obscene films..." 2767.01 et seq. Obscenity defined 2907.37	713.01 2913.01 Minors, pers. to furnish 713.15 profane, immoral, or indecent language 2907.40 Obscene or lascivious language before female or child 2907.30.1 Telephone 4931.31	2907.01 Owner barred for, 2307.01	2907.09 Settlement RC 3941.07	2907.01 2907.04 Giving immoral exhibitions ed. 2907.40	2907.07	2907.21 et seq.

Other Statutes cited: 1. "...obscene, lewd, or lascivious...(immoral)...or article of an indecent or immoral nature...or show to a minor...tendency of moral decay, lust, or crime..." 2907.34

1. "...considered as a whole and judged with reference to ordinary adults, any of the following apply: (1) Its dominant appeal is to prurient interest (2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite; (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; (4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." 2907.34 A

OBSCENITY	LEWDNESS	INDECENCY (Indec.Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PUBLIC TES
					OKLAHOMA					
21-1021 et seq. 21-1040.2 et seq. Seizure 21-1023 Jury trial 21-1034 Oklahoma Literary Commission 21-1040.2 display of sexual impressions on outdoor screen prohibited 21-1040.12	Lewd defined: "licentious, unchaste, debauched, impure, salacious or pornographic" 21-1040.12	Indecent exhibition or exposure to "private parts" "such as is offensive to decency...or to excite ...lewd thoughts." 21-1021 (second)		Nuisance: "...offends decency..." 21-1 Injunction 21-1397 Obscenity injunction 21-1022	21-911 et seq. Recording obscene or indecent language, songs, etc. 21-1021 (4) Telephone 21-1171	21-871 et seq. Imposition of salutary forbidden 21-1040.21 Incestuous adultery 21-885	Showing sexual intercourse on outdoor screen (Widow.) 21-1040.12	21-886 -887 Showing unnatural copulation on outdoor screen 21-1040.12	21-885 43-3 21-217	21-88 21-88
Obscene defined: 12. ..obscene filthy, indecent, immoderate, lewd or unfit..." 21-1040.8; 2. "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 21-1040.12 [also variously defined: filthy, indecent, lascivious, and lewd 21-1040.12]; 3. "(b) ' obscene literature'...any literature offensive to the chastity to modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or...comic books which are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma." 21-1040.1 (b)										
					OREGON					
Obscene motor prints 167.151	Lewdness defined 465.150	Indecent exposure 167.345		Nuisance: "lewdness, lasciviousness, or prostitution, or any other immorality..." 465.120	166.060 school pupils 339.250	167.065 .080	167.030 .033 .050	167.040	167.025 .055	167.35 167.35 167.35 167.35 167.35 167.35
Obscene defined: "...if, considered as a whole, its predominant theme appeals to prurient interest, and if it is plainly offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons." 167.151 (2)										
					PENNSYLVANIA					
18-4534 Complaint 18-783 Obscene comic books 18-3931 Injunction 18-3933.1 Censorship films 6-43	Nuisance 18-417 et seq.	Public indecency not 18-4519	Nudity defined 18-4534	Nuisance: "lewdness, foulness, and/or prostitution..." 18-417 Public Nuis. "detrimental to public health." 53-37299 Obscenity injunction 18-3932.1	18-432	18-4585	18-4536 Adpn. used for, nuisance 18-417 et seq.	18-4585	18-4537 minor 18-530	18-88 18-88 18-88 18-3931 18-3931
Obscene defined: "...that which, in the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest." 18-4534										

GENERALLY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
RHODE ISLAND										
11-31-1 et seq.	Lewdness exposure 11-1-1	Promotion of obscene shows 11-31-14	Nude figures (minors) 11-31-14 11-31-10	Nuisances: "lewdness, assignation, or prostitution" 11-30-1 10-1-1 et seq.	11-9-12 13 11-11-1	11-6-2	11-34-1 Incestuous fornication 11-6-4	11-10-1	11-6-1 11-1-1 et seq.	11-42-1 11-34-1 et seq. Pandering 11-34-1 Nuisance 11-30-1
"Lewd" see obscenity definition 11-31-10				Obscenity injunction 11-31-12						
Obscene defined: 1. "...obscene..." 11-31-1; 2. to minors: "...devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially dressed figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion...or instrument of indecent or immoral use..." 11-31-10									
SOUTH CAROLINA										
16-401 et seq. Nuisance 16-1001 et seq.		Indecent exposure 16-433		Nuisances: "lewdness, assignation, or prostitution" 10-1001 Nuisance "dangerous to human health" Vol. 17,p228 Obscenity injunction 16-416	Obscene message to women 16-553 Telephone 16-552.1	15-494 et seq. grounds for divorce 20-101	16-492 16-490 Disqualifies voter 23-63 92	16-412	16-402	16-600 et seq. Nuisance 10-1001
Public 16-401 Deceptive practices 16-403 Obscene defined: "...obscene, indecent or improper print (etc.)...manifestly tending to the corruption of the morals of youth..." 16-414		Exposure for purpose of lewdness 16-408 (?)								
SOUTH DAKOTA										
13-24-1 et seq.		Indecent exposure felony 22-24-1 et seq. 22-24-2.1		Municipal power to remove 9-29-13 Zoning 11-4-7	Obscene language 22-22-17 22-13-7 Obscene or lascivious language in presence of women or children (also telephone) 22-24-6	22-22-17 18 Grounds for divorce 25-4-2		13-1716	22-22-19 22-22-20 25-1-6 13-1715	13-1717 et seq. Nuisance 21-10-10
Statute 13-24-31 Statut. power to regulate not limited 13-24-25		Outraging public decency and "injurious to public morals"; 22-24-6 Procuring indecent exposure 22-24-1								
					Singing, speaking obscene song, word, etc. 22-24-28					
Obscene defined: "(1)...that which, by contemporary standards as hereinafter set forth, considered as a whole, has as its dominant theme or purpose an appeal to prurient interest. (2) Prurient interest is defined as a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and which as a matter of state public policy is utterly without redeeming social importance." 22-24-2										

OBSCENITY	LEWDNESS	INDECENCY (Indec., Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					ARKANSAS					
39-3002 et seq. to minors 39-3011 et seq. Injunction 39-3005		Municipal power to prohibit indecent exhibitions 6-302	Nudist colony forbidden 39-3009 Nudity defined 39-3011	Nuisance "violation in favor of decency" 39-3001 2002 16 Tenn. App. 414)	41-107 Obscene language 39-3001 Telephone 39-3002	41-3001	41-3002	39-707	39-701 706	39-3301 et seq.
Obscene defined: "...obscene language or obscene prints... manifestly tending to corrupt the morals..." 39-3001										
					TEXAS					
Title 10 Penal Code PC 527 et seq. Adversary Hearing PC 527 (B)(1) Municipal regulation allowed PC 527 (C) Obscenity injunction PC 527 (C) Comic books PC 529	Lewd women in theater PC 528 Lewdness defined PC 667.-	Indecent exhibition PC 528 Indecent exposure: PC 535 G Exposure to infant PC 474 535c Indecent exhibitions, films PC 648 Exposure public grounds PC 852	Nudity: see definition of "prurient interest" PC 527 (B)(3)	Common nuisances "drinking, gambling, prostitution" 4664 Obscenity injunction PC 527 (C)	Obscene language PC 474 3154 d-2 Telephone PC 476	PC 499 500 501	PC 502 504	PC 534	PC 491 et seq.	Penal Code 330 et seq. 329 328 327 1070 et seq. 1121 c Nuisance 4664
Obscene defined: "(1)...material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) which is utterly without redeeming social val ue." "(2) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." title 10, Penal Code, § 527 (1), (2) and (3)										
					UTAH					
76-10-1 et seq. seizure 76-10-7 Injunction 76-10-10 Obscenity to minors 76-10-1 (6) Sex-nude pornography to minors 76-10-1 (8) Commercial knowledge 76-10-1 Local regulation authorized 76-10-16	Open and gross lewdness; assaulting to lewd or lascivious or obscene manner 76-10-813	Indecent exposure (Indecen.) 76-10-1 76-10-13	Nudity: see definition of obscenity: 76-10-11	Nuisance: "...indecent or offensive to sense..." 76-10-1 Public nuisance: "...(3) Offends public decency..." 76-43-1 City power to declare and abate nuisance 10-8-60 Obscenity injunction 76-10-10 Nuisance: "lewdness, lasciviousness or prostitution" 47-3-1	Songs, ballads, or other lewd or obscene words in public place 76-10-1(5) 76-10-13	76-53-3	76-53-5 (modern.)	76-53-22	76-53-4	76-53-31 et seq. 76-53-32 76-53-3 77-36-30 78-8-1 City power to suppress 10-8-60 Nuisance 47-3-1
Obscene defined: "...whether to the average person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest....Prurient interest shall mean a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." 76-10-11										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					VERMONT					
13-2601 et seq.	Open and gross lewdness 13-2601	Exhibiting obscene, lewd or indecent picture...or presents indecent or immoral show 13-2602		Power of Municipalities 24-2121		13-201 202 203		Felonies 13-2603 2601		13-2631 13-2632 Houses of ill fame 13-2604
Obscene public pictures 13-2603										
Obscene defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2601										
					VIRGINIA					
18.1-227 et seq. May be ordered 18.1-236.1		Indecent exposure 18.1-214 18.1-235 to Child 18.1-214	Nudity: was obscenity definition 18.1-227 Sexual Displays 27-415 A-G	Obscenity injunction 18.1-238.3 Municipal Power 15.6	Operating 18.1-237 et seq. Telephone 18.1-238	18.1-187	18.1-188 Cohabitation, 18.1-193	?	18.1-191	18.1-194 et seq.
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227										
					WASHINGTON					
9.68.010 et seq. "Erotic material" defined 9.68.050 (2) Power "whether only" bifid 9.68.060 (3 b) Civic books 7.42.010 et seq.	Lewdness 9.79.120 Sale of lewd publication 49.37.130 Nuisance: 7.48.010 Injunction 7.42.010	Indecent exposure 9.79.080 9.79.120 Indecent articles 9.68.030		Nuisance: "offend public decency" 9.66.010 Nuisances: "lewdness, assignation, or prostitution" 7.48.010 Obscenity injunction 7.42.010 et seq.	Indecent or vulgar language 9.68.040 In public conveyances 9.27.030 telephone 9.61.230	9.79.210 120	False charge of 4.24.150	9.79.100	9.79.090	9.79.10 Nuisance 7.48.010
Obscene defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of sumt in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;..." 9.68.050 (2); 2. "Prohibited publications": "...detailed account of ...rape, carnal knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or, any...account of the actions of any public prostitute (except concerning public welfare)..." 9.68.020									
					WEST VIRGINIA					
61-8-1 leading to corrupt youth 61-8-11 Pornographical publications 61-8-10 61-8-3	Lewd and lascivious cohabitation 61-8-4 Open and gross lewdness Nuisance: Lewdness 61-8-1	Indecent exposure 61-8-20 Immoral shows prohibited -fairs- 19-7-8		Equitable remedies in aid of charity, morality and decency: Article 8 61-8-1 et seq. Nuisance: "lewdness, assignation, or prostitution" 61-8-1	Profanity, obscene, indecent or vulgar language (& telephone) 61-8-16 Profane swearing 8-12-15	61-8-3	61-8-3- Lewd and lascivious cohabitation 61-8-4-	Crimes against nature 61-8-13	61-8-12	61-8-5 et seq. Nuisance 61-8-1
Obscene defined: "...obscene language...or description manifestly tending to corrupt the morals of youth...or public morals..." 61-8-11										

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICATION	SODOMY	INCEST	PROSTITUTION
					VERMONT					
13-2801 et seq. As minors 13-2804 et seq. Obscene motion pictures 13-2803	Open and gross lewdness 13-2601	Exhibiting obscene, lewd or indecent posture...or presents indecent or immoral show 13-2802		Power of Municipalities 24-2121		13-201 202 203		Fellation 13-2601 2601		13-201 13-202 Keeping a 13 Ver. 13-204
Obscene defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2801										
					VIRGINIA					
18.1-227 et seq. May be enjoined 18.1-236.3		Indecent exposure 18.1-214 18.1-238 In Child 18.1-214	Nudity: see obscenity definition 18.1-227 Sexual Displays 27-416 A-C	Obscenity injunction 18.1-236.3 Municipal Power 15.0	Swearing 18.1-237 et seq. Telephone 18.1-238	18.1-187	18.1-188 Cohabitation, 18.1-193	?	18.1-191	18.1-21 et seq.
Obscene defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227										
					WASHINGTON					
9.68.010 et seq. "Erotic material" defined 9.68.050 Placing "adults only" label 9.68.060 (3) (a) Comic books 7.42.010 et seq.	Lewdness 9.79.120 Sale of lewd publication 9.68.130 7.48.010 Nuisance: 7.48.010 Injunction 7.42.010	Indecent exposure 9.79.080 9.79.120 Indecent articles 9.68.030		Nuisance: "offend public decency" 9.68.010 Nuisance: "lewdness, assignation, or prostitution" 7.48.010 Obscenity injunction 7.42.010 et seq.	Indecent or vulgar language 9.68.040 In public conveyances 9.27.030 Telephone 9.61.230	9.79.130 130	False charge of 4.24.120	9.79.100	9.79.080	9.79.13 Prisoner 7.48.80
Obscene defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value...." 9.68.050 (1); 2. "Prohibited publication": "...detailed account of ...rape, carnal knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or, any...account of the actions of any public prostitute...[concerning public welfare]..." 9.68.020										
					WEST VIRGINIA					
61-8-11 Dealing to corrupt youth 61-8-12 Pornographic publications 61-8-10 61-8-3 Obscene defined: "...obscene language...or descriptions manifestly tending to corrupt the morals of youth...or public morals..." 61-8-11	Lewd and lascivious exhibitation 61-8-4 Open and gross lewdness Nuisance 61-8-1 Lewdness 61-8-1	Indecent exposure 61-8-20 Immoral shows prohibited -Injunction 19-7-8		Equitable remedies in aid of chastity, morality and decency: Article 8 61-8-1 et seq. Nuisance: "lewdness, assignation, or prostitution" 61-8-1	Profanity, obscene, indecent or vulgar language (& telephone) 61-8-16 Profane swearing 6-10-15	61-8-3	61-8-3- Lewd and lascivious cohabitation 61-8-4-	Crimes against nature 61-8-13	61-8-12	61-8-1 et seq. Nuisance 61-8-1

APPENDIX Q

Page

Los Angeles Herald Examiner News Article of Feb. 18, 1974, reporting on T.V. logging of "The Sex Symbol" for March 5, 1974 being dropped..... 3

Los Angeles Times News Article of Feb. 19, 1974 reporting Connie Steven's (Star of "The Sex Symbol" and alleged T.V. nude scene) as saying "This will turn my career around as 'Carnal Knowledge' did Ann-Margret's"..... 4

TELEVISION

TV MAVEN

MORTON MOSS

The Great 'Sex' Crisis

It was hardly a riddle wrapped in an enigma that Connie Stevens, in "The Sex Symbol, which ABC had lagged for Tuesday, March 5, had the bizarre papier-mache odyssey of the late Marilyn Monroe as the source of an ambitious bowie of the Week performance.

So when ABC abruptly dropped it from the schedule, without a too definitive statement about when it would finally be screened, there was a mailer uproar as newspapers around the country. There followed a mad jingling of telephone calls from editors whose TV books for the Sunday preceding March 5 were already irretrievably printed.

Today, although ABC holds the film inconsonicado, "to do additional work on it," according to Barry Diller, network vice president for primetime programs, it has already become a success de scandale. Lavish hints of nudity, an aura of neurotic eroticism and the celebrated on whom the characters are allegedly modeled lend bite and edge to the keenest of speculation. Besides, the principals in these rooms at the top have seasoned the dish with greatly contradictory utterance as to cause.

CONNIE STEVENS

ABC and Screen Gems, the co-producer with Doug Cramer, had been engaged in a high decibel promotional campaign. Unofficially, this was to be the Marilyn Monroe story, although, officially, indentation teamed with coy reluctance to spill it out. They were reaping a boomerang blast from their swinging publicity campaign. Unless . . . unless the boomerang wasn't really a boomerang but also a calculated result of that campaign, a thought nearly too cynical to contemplate.

Connie Stevens told us from Harrah's, at Lake Tahoe: "I'm devastated. It's the best thing I've ever done. ABC okayed the television nudity and then got worried and wanted to take it out. If ABC is willing, I'd like to buy the picture and release it myself."

They're In Opposite Camps

Diller and Cramer contend that Stevens is mistaken about the nudity, perhaps confusing the TV version with the frankly undressed film for foreign distribution. But, elsewhere, they fall into diametrically opposed camps on the steps leading to the shock postponement.

"It's absolutely and categorically untrue," Diller said, "that we approved nudity in the television film. We never approved it and wouldn't care to be in a position of approving it. It's ridiculous to claim otherwise. We did shoot some nudity for the print meant for foreign theatrical distribution. I don't mind being attacked over something we did. What upset me is to be attacked for something we didn't do.

"I guess all the fuss comes because of the publicity. It's not that complicated. It was postponed simply because we want to do additional work on it. We should be ready with it in the

(Continued on Page 5)

Morton Moss: Ingenue

(Continued from Page 4)

future. I think sometime this season. We'll know more exactly in the next couple of weeks. We just cut the time too short in making the picture. There was no other reason, no pressure. No outside force had anything to do with the decision."

Cramer said, "I only learned last Wednesday about the decision to postpone. I don't know what ABC wants done with it. I haven't had that meeting yet. ABC programming and continuity had seen it and approved it in rough-cut. ABC is obviously contradicting itself. Somebody changed his mind. I can't tell you why because I don't know why. As for the nudity, there wasn't going to be any for television. It was Connie's exclusion, I think, with the longer version for the foreign market."

He disclosed that "The Sex Symbol" cost a half million dollars, plus. He expected that it would eventually be released because of Columbia's heavy investment in it. Of course, it could be released as a feature in Europe and kept in solitary here by ABC.

The script of "The Sex Symbol" was written by Alvah Bessie, transposing the content of his novel, "The Symbol," to the electronic medium. It's the story of an orphan. She has foster parents, becomes a Hollywood sex symbol, is unwesonly involved with a football player, a famous painter and a United States senator.

"You could insist it wasn't based on Marilyn Monroe," said Cramer, "But you'd be wrong. The feeling of ABC in that it wasn't ready. I think we had a film that would have been ready for release March 5, the original television date."

She Thought It a Breakthrough

Connie's chagrin was tied to her belief that this could be the breakthrough movie for her. She has always brooded that she could never obtain roles that were sufficiently weighty. She's convinced "The Sex Symbol" characterization turns a corner for her.

"I've existed on a lot of light-weight things," Stevens said. "I was the cute little bunny girl next door. That was the image. I've never really done the things I've wanted to do. I was at Warner's seven and a half years. I fought the parts they kept throwing at me. I saw it coming. I was no longer an ingenue. I had the mind and body of a woman. I had to have a change, or I'd go into oblivion.

"I never met Marilyn Monroe, but she fascinated me. She was the No. 1 movie queen. In a way, it was the ultimate female life. She had so much animal sex. Actually, she was a sex symbol who wasn't really a sex symbol. She was a child, an emotional cripple. She couldn't survive the complexities an actress, especially one in her position, has to face."

We had spoken to Stevens before, of course. But we can't remember her ever discussing a project with such vocal intensity. The conceptions of Monroe and nudity fuse without any difficulty. The problem, if that's how you choose to label it, naturally arose with the shooting of "The Sex Symbol."

Connie said, "I hadn't ever previously been completely nude in front of a camera. I discovered what it's like for an actress to take off her clothes and do a highly emotional scene. It has a great effect on your psyche, on your subconscious. It wasn't 100 times but 1000 times better in the nude. It brought my entire inner person to bear on the situation. It was so poignant, I became unglued. Once, after the director said, 'Cut!' I cried for five minutes."

At the moment, she's unglued again. But there are ungluings and ungluings.

JOYCE HABER

Los Angeles Times Tues., Feb. 19, 1974-Part

'Sex': Now You See It, Now You Don't

"The Sex Symbol" stars Connie Stevens, looking remarkably like the late Marilyn Monroe, and Dan Murray, looking remarkably like one of the Kennedys. "Symbol" is based on Alvah Bessie's controversial novel, "The Symbol," whose major characters remarkably resemble Monroe, Joe DiMaggio and Arthur Miller.

"The Sex Symbol" is the talk of Hollywood. It was screened for numerous critics and columnists last week to an overall excellent response: "Connie is absolutely brilliant, fantastic, fabulous," wrote Sue Cameron of the Hollywood Reporter.

TV Guide decided to do a close-up on this ABC Movie of the Week. The Herald-Examiner and some 30 other papers scheduled it as the cover story for TV supplements and I rushed out to interview Miss Stevens for a profile before she left for Harrah's, Tahoe with her club act—because Miss Stevens is remarkable in the film.

The film is also remarkable, in the sense that it treats the vulnerability of an American woman and her destruction by the American male. Which is a nice switch from mention and the female put-down.

It contains fine performances, too, by Jim Olsen (as a Arthur Miller), William Smith (as a DiMaggio), Madlyn Rhue (as a Pat Newcomb), (producer) William Castle (as a Harry Cohn), Nehemiah Persoff (as a Darryl Zanuck) and Jack Carter (as an MCA-type agent). It was scored by Francis Lai ("A Man and a Woman," "Love Story") after Henry Mancini turned it down "because I never score movies for television." Mr. Mancini's objectivity is apparent in the fact that he is now recording Lai's theme: Mancini's RCA single will be the first version, out next week.

Mancini's may be the first hit single in history of a score for a film that may never be shown. Because, less than three weeks before its airdate, March 5, "The Sex Symbol" was yanked from ABC's schedule. Causing a furor similar to that which occurred when "Last Tango in Paris" was yanked from the big screen in many U.S. cities.

Thus, a week from Sunday, millions of Americans will be reading local cover stories on "Symbol"—and will be treated, two nights later, not to the New Connie Stevens, but to some old NOW rerun. (In fact, the old Elizabeth Montgomery, in "The Victim.")

What happened? No one knows. But speculation began immediately. The industry and the London press were speculating that the Kennedy family, or Sen. Edward Kennedy's probable presidential campaign manager, had put pressure on ABC. Or was it Joe DiMaggio? Or Arthur Miller? Or was there too much "reality" in the film?

What is known is that the picture had been cleared by ABC's censors for airing, had been approved for theatrical distribution abroad, and that ABC's programming chief, Barry Diller, then happened to see it accidentally. I say "accidentally" because Hollywood producer-tasters will tell you that Mr. Diller almost never looks at his pictures before they go on the air.

When the news of the cancellation leaked executive

LOOKALIKES—Marilyn Monroe, left, and Connie Stevens, who portrays a character based on Monroe in suddenly canceled ABC movie, "The Sex Symbol."

producer Doug Cramer's office alone received 111 phone calls within eight hours. ABC's Diller admitted to me: "I don't understand it. I've often changed airdates, but I've never gotten so many calls from important journalists across the country."

To make matters murkier, ABC ad Screw Goss issued an "official" statement saying that "Symbol" had been withdrawn because it wasn't ready: It had been shot as a two-hour movie, was to show for 74 minutes and needed further editing. But the 74-minute version was the one approved by continuity acceptance and critics alike. Screen Gems president John Mitchell was unavailable for comment. He was in the hospital passing a kidney stone—which may become famous as "The Monroe Stone." Over the weekend, ABC's Diller came down with an upper respiratory infection. That may be known as "The Marilyn Throat."

Said performer Stevens from Tahoe (she opens at Las Vegas' Flamingo on Thursday): "The night before they canceled, all signs were 'Go.' The network had been ranting and raving about how great the movie was. They were saying I had a shot at an Emmy nomination." Insiders agree that if "Symbol" had played on its scheduled date (a show must air before March 13 to qualify), Connie would most likely have been up for an Emmy. Against Cicely Tyson, of the superb project that ABC's Diller started developing, then dropped: CBS' "Autobiography of Miss Jane Pittman." Diller said of it: "It's drudgery, pure drudgery. It's just like mopping floors for two hours—except that I've never mopped a floor." Also against Katharine Hepburn, of ABC's "Glass Menagerie," and possibly ABC's Marlo Thomas, whose special, "Free to Be You and Me," airs March 11. (Diverse as the candidates may seem, they aren't to the TV Academy, which this year changed its categories.)

Connie worked for one half her usual salary, $7,500, to get the role in "Symbol." She's promoted it on the Carson, Griffin and Mike Douglas shows. A billboard on the Sunset Strip features Connie, nude body draped in a sheet, as "Sex Symbol."

"Can you imagine?" she asks. "Can you just imagine? People are turning my head around saying, 'Did you turn my corpse around as 'Corpse Knowledge of Art Museum'? And I'm devastated."

Oddly enough, ABC has a big-night blockbuster of Marilyn-Monroe-forthcoming on its Wide World of Entertainment. And NBC has a Hallmark special production of Miller's "After the Fall" for April. Consensus is that ABC would have gotten a 50 share of audience by airing "Sex Symbol," something its badly sagging Movies of the Week this year could use. Somebody up there is apparently afraid of a 50 shares. Which will now undoubtedly go to NBC's "After the Fall."

Even 12 years after her death, the late Marilyn Monroe still makes more news than anyone in Hollywood (except Barry Diller).

APPENDIX R

Pages 89-93 of the Brief Amicus Curiae Charles H. Keating Jr. in *Paris Adult Theatre I v. Slaton*, No. 71-1051 containing Point IA1 of the Argument, titled

IA1

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The Common Standards of Right and Wrong Embodied in the Statutory Law of this Nation and the State of Georgia should be applied as the Rule of Law in this case in finding the Two Films to be "Obscene as a Matter of Law" 3-7

ex rel. Keating v. Vixen, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971).

1. THE COMMON STANDARDS OF RIGHT AND WRONG EMBODIED IN THE STATUTORY LAW OF THIS NATION AND THE STATE OF GEORGIA SHOULD BE APPLIED AS THE RULE OF LAW IN THIS CASE IN FINDING THE TWO FILMS TO BE OBSCENE AS A MATTER OF LAW.

It is the basic contention of Amicus that the eyes of this Court, in reviewing the Georgia Supreme Court ruling below, should be focused upon the concepts which support the statutes being applied by Respondents, that is the universal verity that lewdness and obscenity are public nuisances, which are abatable under the law, and the ethical values shared by this Nation, as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. A state-by-state survey of the Nation's laws dealing with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity is attached as Appendix "B". Appellants submit that these laws define the national standards which everyone in the courtroom today is seeking to ascertain.[21] This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. Calif.*, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 (Justice Frankfurter concurring opinion). *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 470, 91 L.Ed.422, 67 S.Ct. 374 (concurring opinion). In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325, handed down on the same date as the *Roth-Alberts* decision, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), Justice

[21] See footnote 12 at page 75.

Frankfurter, in speaking for the majority of that Court in a case closely paralleling the matter herein, said, at page 1473:

> "In an unbroken series of cases extending over a long stretch of this Court's history, *it has been accepted as postulate* that 'the primary requirements of decency may be enforced against obscene publications.' Id. 283 U.S. at 716." (Our emphasis.)

In *Solesbee v. Balkcom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, Reh. Den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected *from the practices in the states*. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons

who become insane while under sentence of death."

In reviewing the ruling of the Georgia Supreme Court which abated both films as a *matter of law*, this Court should judicially recognize that it was in the background of this Nation's well-established and shared ethical values that the producers of those films opted to move into the motion picture entertainment field and capitalize commercially via sensationalism, upon the natural abhorrence of civilized government to public displays of explicit sexual conduct. *One just does not fornicate in public, be it actual or simulated* – nor may he on the public screen. (See Judge Burke's opinion, infra at page 93 .) The relevant historical facts under consideration certainly encompass this Nation's ethical values, as reflected in the well-knit pattern of city, state and federal laws relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values exist for the benefit of the family unit which is at the very core of government in our Judaeo-Christian culture and are deserving of this Court's strong support.

The common standards of right and wrong embodied in the statutory law of Georgia should be applied as the rule of law in this case in upholding the Georgia Supreme Court's finding that the films "It All Comes Out In The End" and "Magic Mirror" are UNLAWFUL AS A MATTER OF LAW. This was the view of the unanimous Ohio Court in *City of Youngstown v. De Loreto*, 251 N.E.2d 491 (September 10, 1969). In *De Loreto*, the court enumerated the state statutes and city ordinances which prohibited specific immoral conduct. From that the court deduced what the Moral Standards of Ohio People on Sex were. (See *De Loreto* at pages 500

and 501. See also *Ohio ex rel Ewing v. "Without A Stitch"*, 276 N.E.2d 655 at 659 (July 9, 1971) and *Ohio ex rel Keating v. "Vixen"*, 272 N.E.2d 137 at 141 (July 21, 1971).

It is the prerogative of this Court to take judicial notice of the laws of the State of Georgia relating to sexual morality and apply them in reviewing the issue of obscenity in this case.

The vast history of the Common Law and the statutes of the State of Georgia make clear those particular areas of public conduct which are so immoral, so contrary to the immemorial custom of propriety of the people, so opposite to the natural sense of conscience and justice of the people, so pervasively at odds with the community notions of right and wrong, so consistently maintained as illegal and contrary to Anglo-American public policy that their display and exhibition to the public, either live or recorded, is UNLAWFUL AS A MATTER OF LAW. Obscenity, public indecency, incest, lewdness, immoral exhibitions, sexual perversion, and sodomy et seq., all are enumerated acts the public portrayal of which a judge should recognize as being part of the Common Law specification of "obscenity." See Appendix B. – 4 "Georgia."

The courts have always been willing to take judicial notice of those facts and policies that are of general and incontrovertible knowledge. Such matters include those facts of a common or general knowledge that are well and authoritatively settled, not doubtful or uncertain, and known to be within the limits of the jurisdiction of the court. (28 Am. Jur.2d Sec. 34) They also have included a recognition of the ordinary instincts, passions, emotions, and motives which universally, in a greater or lesser degree, influence the actions and conduct of mankind. (28 Am.Jur.2d Sec. 114)

In addition, judicial notice has been extended to matters of public and social welfare (29 Am.Jur.2d Sec. 143) and the customs and usages of man which are generally known or accepted to an extent sufficient to make them matters of common knowledge. (28 Am.Jr.2d Sec. 121)

2. THE PERFORMANCE OF SEXUAL INTERCOURSE IN PUBLIC, WHETHER REAL OR SIMULATED, LIVE, OR AS PART OF A MOTION PICTURE FILM OR STAGE PLAY IS AGAINST PUBLIC POLICY AND AS SUCH IS OBSCENE PER SE:

By far the best legal opinion on this point of law is that of Judge Burke's speaking for the majority of the New York Court of Appeals in *Trans-Lux Dist. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964), at page 857:

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures (Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-557

BILLY JENKINS,
Appellant

v.

STATE OF GEORGIA,
Appellee

On Appeal from the Supreme Court of Georgia

SUPPLEMENTAL BRIEF FOR APPELLANT

Appellant Billy Jenkins respectfully submits this Supplemental Brief, and shows the following:

The arguments advanced in the Brief for Appellee are essentially the same as those advanced in Appellee's Motion to Dismiss or Affirm this appeal. Appellant has already responded to those arguments in his Reply to Appellee's Motion, and, rather than burdening this Court with repitition, respectfully directs its attention to that Reply.

Appellant files this Supplemental Brief for the purpose of calling the Court's attention to two obscenity cases decided by the Supreme Court of Georgia after the Brief for Appellant was filed on January 23, 1974. *Sanders* v. *State*, — Ga. —, — S.E.2d — (January 28, 1974); *S.S.W. Corporation* v. *Slaton*, — Ga. —, —

S.E.2d — (February 18, 1974). These decisions are reprinted in full in the Appendix hereto.

The Supreme Court of Georgia's decision in the instant case, *Jenkins* v. *State*, 230 Ga. 726, 199 S.E.2d 183 (July 2, 1973), was the first of the four post-*Miller* obscenity decisions which to date have been handed down by that Court. In *Jenkins*, the Court held that Georgia Code Ann. §26-2105 (exhibition of a film portraying acts which would constitute "public indecency")[1] should be "construed together" (JA 53) with Georgia Code Ann. §26-2101(b) (obscenity).

The Supreme Court of Georgia's three subsequent obscenity decisions involved §26-2101(b) alone; they did *not* involve §26-2105.

In the first of these, *Slaton* v. *Paris Adult Theatre I*, 231, Ga. 312, 201 S.E.2d 456 (October 30, 1973), petition for certiorari pending (No. 73-1161), the Court held that, *as of 1971*, §26-2101(b) had already been limited in application to material portraying types of conduct[2] different from those encompassed by §26-2105.

It is Appellant's contention that, because of the different types of conduct to which §§26-2105 and 26-

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[1] The acts encompassed by §26-2105 are enumerated in Georgia Code Ann. §26-2011 — "An act of sexual intercourse," "A lewd exposure of the sexual organs," "A lewd appearance in a state of partial or complete nudity," and "A lewd caress or indecent fondling of the body of another person."

[2] "[A]cts of sexual intercourse, natural, unnatural, bizarre, and violent" and "[A]ctual sexual activity, both natural and unnatural." (231 Ga. at 315, 201 S.E.2d at .)

2101(b) apply, it is impossible to determine what §26-2105 proscribes when it is "construed together" with §26-2101(b). See Brief for Appellant, pages 32-37.

The Supreme Court of Georgia's two most recent obscenity decisions, *Sanders*[3] and *S.S.W.*,[4] reaffirm the constitutionality of §26-2101(b) as construed in the *Paris* case. It is Appellant's view that the *Sanders* and *S.S.W.* decisions further highlight the fact that Georgia Code Ann. §26-2105 is hopelessly void for vagueness when it is "construed together" with §26-2101(b).

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[3] See pages 5, 10 of the Appendix hereto for the Supreme Court of Georgia's discussion of the obscenity test in *Sanders*.

[4] See page 13 of the Appendix hereto for the Supreme Court of Georgia's discussion of the obscenity test in *S.S.W.*

CONCLUSION

For the reasons set forth above and in the Brief for Appellant, the judgment of the Supreme Court of Georgia violates the First and Fourteenth Amendments to the United States Constitution, and therefore must be reversed.

Respectfully submitted,

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APPENDIX

IN THE

SUPREME COURT OF GEORGIA

Decided: January 28, 1974

28352 SANDERS v. STATE OF GEORGIA

INGRAM, Justice. The District Attorney for the Stone Mountain Judicial Circuit filed suit on behalf of the State of Georgia against Arthur R. Sanders, Jr., doing business as "Adult Book Store," together with other named individuals, seeking to have the business of Sanders declared a public nuisance and to obtain an injunction against its continued operation in violation of Section 2 of Ga. L. 1971, p. 888 (Code Ann. §23-3402) and a certain DeKalb County ordinance, Code of DeKalb County, Part II, Chap. 10, Art. VI.[1] A hearing was conducted by the trial court as trior of law and fact, and thereafter the following judgment was rendered:

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[1] Code §§ 23-3402 and 23-3403 (Ga. L. 1971, pp. 888, 889), incorporated in the DeKalb County ordinance, provide:

"Each adult bookstore and adult movie house is hereby prohibited from operating within 200 yards of any church, church book store, public park, public housing project, hospital, school (Public or private), college, recreation center or private residence. The governing authority of each county and municipality is hereby authorized to enact, for their respective jurisdictions, ordinances relating to the subject of this section.

"The term 'adult bookstore' shall mean any commercial establishment in which is offered for sale any book or publication, film or other medium which depicts nudity or sexual conduct.

"The term 'adult movie house' shall mean any movie theater

"*Findings of Fact*

"Plaintiff, the State of Georgia, by and through the office of the District Attorney of the Stone Mountain Judicial Circuit filed a petition with an amendment thereto alleging that the named defendants were engaged in the occupation of operating an adult book store on the premises located at 1815 Candler Road, that it was a commercial establishment which offered for sale books, publications and other media which depict nudity and sexual conduct;

"That the operation of this adult book store is in violation of Georgia Code Annotated 23-3402 and of a DeKalb County ordinance which was made a part of this petition and marked Exhibit A;

"That the operation was done without a valid business license and that the operation constituted a public nuisance which should be abated by law;

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which on a regular, continuing basis shows films rated X by the Motion Picture Coding Association of America, or any movie theater which presents for public viewing on a regular, continuing basis so-called 'adult films' depicting sexual conduct.

"The term 'sexual conduct' shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast.

"The term 'nudity' shall mean the showing of the human male or female genitals or pubic area with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state."

The ordinance additionally provides for licensing of adult book stores and movie houses, together with various regulatory provisions. Under Code Ann. § 23-9915 and § XII of the ordinance criminal sanctions may be imposed for violation of the provisions.

"That the operation is in violation of Code Section 26-2101 of the Criminal Code of Georgia in that obscene materials are being sold, distributed, exhibited and otherwise disseminated to persons other than the defendants and the obscene materials were possessed by the defendants in and upon said premises with the intent to sell, distribute and otherwise disseminate the same to other persons and the defendants were aware of and knew the obscene nature of said obscene materials.

"The plaintiff introduced some six exhibits, three of which were material sold and maintained for sale by the defendants. Defendants contended that under the Code Section and under the ordinance, all of the various places in the county selling certain publications of general circulation would be in violation of said ordinance and said Code Section.

"Defendants contend that any interference with their operation would be in violation of the First Amendment of the Constitution of the United States, that the ordinance of DeKalb County was promulgated after the defendants began business and was, therefore, ex post facto.

"The defendants further contended that the statutes and ordinance are repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and that said provisions are void because of vagueness and impermissible overbreadth. The defendants admit that they sell and possess for sale State's Exhibits 4, 5 and 6.

"*Conclusions of Law*

"The court finds that the said book store was oper-

ating within 200 yards of some 29 residences, a church and a church book store.

"The court finds that the three exhibits heretofore mentioned come within the definition of Code Section 23-3403 and that the defendant has admitted having the three exhibits and having them for the purpose of sale as well as having an unknown number of other copies of said same exhibits.

"The court finds that State's Exhibit Number 5 comes within the Obscenity Statute.

"Wherefore, 1 — The court hereby restrains and enjoins said adult book store from operating and restrains and enjoins the defendants from operating said adult book store.

"2 — The Sheriff of DeKalb County is hereby directed to abate said public nuisance and padlock said premises until further order of this court.

"3 — That said defendants were operating without a valid license from DeKalb County, Georgia."

The judgment of the trial court has been appealed to this court and presents for resolution two central issues. These are:

(1) Whether Section 2 of Ga. L. 1971, pp. 344, 345 (Code Ann. § 26-2103) represents an unconstitutional prior restraint when construed and applied to authorize the permanent closure of the book store as a public nuisance upon a finding that a single publication, obscene under the standards of Code Ann. § 26-2101 (b), was sold on its premises; and,

(2) whether Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Chap. 10, Art. VI) are unconstitutional facially and as applied because they are overly broad and therefore void as an infringement of free speech and expression.

I

Section 2 of Ga. L. 1971, pp. 344, 345 (Code Ann. § 26-2103) provides, "The use of any premises in violation of any of the provisions of this Chapter [Code Chap. 26-21] shall constitute a public nuisance." The Chapter referred to in this Code Section is that part of the Code dealing with obscene materials. Section 26-2101 (b) of this Chapter was recently construed and upheld by this court in *Slaton v. Paris Adult Theatre*, 231 Ga. 312 (SE2d) (1973). We note that if premises are used to sell or distribute material and film which are obscene under § 26-2101 (b), such premises constitute a public nuisance under § 26-2103 of the Code.

The problem encountered in applying these laws in this case to justify closing the entire book store is the ancient right of free men to say and print what they wish without prior restraint. Blackstone put it succinctly in these words: "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." 4 Blackstone, Commentaries, 151, 152. This principle has found expression in Art. I, § I, Par

XV (Code § 2-115) of the Georgia Constitution, providing, "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty." The First Amendment to the Federal Constitution also provides that: "Congress shall make no law . . . abridging the freedom of speech or of the press."

Free expression is rooted deeply in our way of life and cannot be suppressed through statutes which compromise the exercise of this freedom. This does not mean that one is free to express obscenity. Injunctive procedures are available to stop obscene expressions. Walter v. Slaton, 227 Ga. 676 (182 SE2d 464) (1971); Evans Theatre Corp. v. Slaton, 227 Ga. 377 (180 SE2d 712) (1971); Slaton v. Paris Adult Theatre I, 231 Ga. 312 (SE2d) (1973).

In *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957) the Supreme Court of the United States disregarded the notion once held that the doctrine of prior restraint did not apply to attempts to enforce "the primary requirements of decency . . . against obscene publications." See Near v. Minnesota, 283 U. S. 697, 716 (1931). The Court, in *Kingsley Books*, authorized a temporary injunction to preserve the status quo pending adjudication of obscenity and declared such a procedure was acceptable if there were procedural safeguards which prevented serious and long-lasting suppression before a final judicial determination of obscenity was made. See, also, *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963). In other cases before the Court, *Freedman v. Maryland*, 372 U.S. 51 (1965); *Teitel Film Corp. v. Cusack*, 390 U. S. 139 (1961);

and *Blount v. Rizzi*, 400 U. S. 410 (1971), three procedural prerequisites were further evolved respecting the suppression or seizure of materials of film alleged obscene without doing damage to the doctrine of prior restraint. Summarized, they are: (1) in each case the government must institute judicial proceedings whereby the material or film is seized or suppressed, and it must further bear the burden of proof of the obscenity of the material or film; (2) the goverment-instituted proceeding must place the defendant exhibitor or seller on notice as to what film or publication he has exhibited, sold or held for sale that the government seeks to seize or suppress; and (3) the proceeding must provide for a prompt and final judicial determination of the obscenity of the film or material. Temporary restraints to preserve the status quo in this regard are authorized after an adversary hearing and when followed by a prompt final determination of obscenity. See, also, Paris Adult Theatre I v. Slaton, 413 U. S. 49 (1973). For cases involving seizures under warrant, see *Heller v. New York*, 93 S. Ct. 2789 (1973); *Roaden v. Kentucky*, 93 S. Ct. 2796 (1973); *A Quantity of Copies of Books v. Kansas*, 378 U. S. 205 (1964); and *Marcus v. Search Warrants of Property*, 367 U. S. 717 (1961).

One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitutions. As said

in the case of *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971): An "injunction, so far as it imposes prior restraint on speech and publication constitutes an impermissible restraint on First Amendment rights. [And it is impermissible where it] operates, not to redress alleged private wrongs, but to *suppress*, on the basis of previous publications, *distributions of literature of 'any kind'* . . ." 402 U. S. at 418 (Emphasis added). Section 2 of Ga. L. 1971, pp. 344, 345 (Code Ann. § 26-2103), insofar as it has been applied in the present case to authorize the permanent closure of appellant's book store, is unconstitutional.

II

The remaining issue for decision is the constitutionality of Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Chap. 10, Art. VI) here involved. Both attempt to regulate expression which, as defined, is not obscene, and to impose criminal and civil sanctions upon its exercise if done so within 200 yards of churches, schools, etc. In Slaton v. Paris Adult Theatre, supra, this court interpreted Code Ann. § 26-2101 (b) which defines obscenity in Georgia. In that case, we determined the limits upon the kind of expression that could be punished criminally and subjected to civil suppression without offending constitutional rights. It necessarily follows that expression outside the defined area is constitutionally protected expression. This means that any statute or ordinance which seeks to impose criminal or civil sanctions for the exercise of expression that is not obscene cannot withstand a proper constitutional attack for overbreadth. Cf. Gooding v. Wilson, 205 U. S. 518 (1972).

It is to be noted that, like any other book store, this one is subject to reasonable regulation, zoning and licensing under the police power of the State and its subdivisions. However, the overly broad coverage contemplated by this statute and ordinance creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. To apply this statute and ordinance literally to the appellant's book store creates an *in terrorem* effect on the exercise of freedoms guaranteed and cherished under both State and Federal Constitutions. We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose.

We hold, therefore, that both Section 2 of Ga. L. 1971, pp. 888, 889 (Code Ann. § 23-3402) and the DeKalb County ordinance (Code of DeKalb County, Part II, Chap. 10, Art. VI) are unconstitutional on their face for overbreadth, through the imposition of criminal and civil sanctions for the exercise of otherwise protected speech and expression.

III

An independent appellate review has been conducted of State's Exhibits 4, 5 and 6,[2] introduced by the

[2] State's Exhibition No. 4 is a xeroxed copy of a magazine entitled "Buttocks Bazaar", Vol. 1, No. 3 (Rainbow Publications, Mays Landing, 1972); State's Exhibit No. 5 is a copy of a paperback book entitled "Housewives Who Invite Rape"

State during the hearing below, and under the standards of this court's ruling in Slaton v. Paris Adult Theatre I, 231 Ga. 312 (SE2d) (1973), we have determined each of these exhibits is obscene. These publications depict in varying degrees nude males and females with prominently exposed genitalia. Exhibit 5 included photographs of couples engaged in sexual intercourse and fellatio. The trial court is directed to enter an appropriate order permanently enjoining the exhibition, sale and distribution of these publications, together with all copies thereof.

Judgment reversed; remanded with direction. All the Justices concur except Jordan, J., who dissents.

(Greenleaf Classics, Inc., San Diego, 1972); and State's Exhibit No. 6 is a magazine entitled "Cover Girl, an International Art Magazine" (Nordisk Bladcentral A/S, Copenhagen, 1968).

IN THE
SUPREME COURT OF GEORGIA

Decided: February 18, 1974

28400. S.S.W. CORP., et al. v. SLATON

GUNTER, Justice. This appeal is from a judgment granting a temporary injunction until further order of the court against the appellants. The temporary injunction prohibited them from continuing the showing of the motion picture "Deep Throat" to theatre audiences in Fulton County.

Appellants sought an order from the trial court superseding the temporary injunction pending a final determination of the case. Supersedeas was denied by the trial court, the effect of such denial being to prohibit the showing of the film during the pendency of the case. Appellants then made a motion in the Supreme Court of Georgia for an order superseding the temporary injunction issued by the trial court, and on October 1, 1973, this Court issued its order denying the appellants' application for supersedeas. This Court's order of October 1, 1973, is set forth in the appendix to this opinion.

The appellants have now appealed to this Court, contending that the trial court's temporary injunction

judgment was erroneous. We hold that the granting of a temporary injunction in this case was legally proper, and we affirm the judgment below.

This case began when the District Attorney brought an action against the appellants seeking a declaration that the film was obscene and further seeking a temporary and a permanent injunction to prohibit its further exhibition by the appellants within the jurisdiction of the court. This action was filed on September 6, 1973. The appellants filed responsive motions and pleadings and entered into a stipulation of facts with the District Attorney on September 10, 1973. On that same date, September 10, 1973, an adversary judicial hearing was conducted by the trial judge. Evidence was introduced, the trial judge personally viewed the film, and argument by counsel for the parties was heard. Following this hearing the trial judge rendered findings of fact and conclusions of law to the effect that the film was obscene as defined by Georgia law, and he entered a judgment temporarily enjoining further exhibition of the film until further order of the court. Motions by the appellants to supersede this judgment were then denied by the trial judge and by this Court (on October 1, 1973) as hereinbefore related.

The appellants now make two basic contentions in this appeal: (1) the Georgia statutes which permit suppression of obscenity by the State are unconstitutional, and (2) the temporary suppression of a film, prior to a final judicial determination that it is obscene, constitutes "prior restraint" that is violative of First Amendment rights.

I

In this case there was no suppression by the State of this film until after an adversary judicial hearing. The appellants stipulated that they had been exhibiting the film, and the film itself was viewed by the trial judge at the hearing. The trial judge then found that this film was obscene pursuant to Ga. Code § 26-2101, that its exhibition constituted a crime pursuant to Ga. Code § 26-2101, and he temporarily enjoined its further exhibition.

In Slaton v. Paris Adult Theatre, 231 Ga. 312, — SE 2d —, (decided October 30, 1973), this Court upheld the constitutionality of this Georgia statute after having reviewed it in the light of Miller v. California, 413 US 15, and other decisions of the Supreme Court of the United States referred to. We now hold again that Code § 26-2101 is not unconstitutional; the trial judge was duly authorized to use the definition of obscenity contained therein; the exhibition of a film falling within this definition is a crime pursuant to the statute; and the further exhibition of such a film can be enjoined.

II

We now turn to the contention that an interlocutory or temporary injunction prohibiting the continued showing of a film, prior to a final judicial determination that the film is obscene, is a "prior restraint" that is violative of First Amendment rights.

"It is now firmly established that 'obscenity' is not protected by the free speech clause of the First

Amendment and may be regulated by the State. (Cits)." Slaton v. Paris Adult Theatre, 231 Ga. at 314.

In this case the temporary injunction was not entered on the basis of mere "probable cause" that the film was obscene. An adversary judicial hearing was conducted by a trial judge, he viewed the film itself, and he determined that the film was obscene within the meaning of Georgia law. He then entered a temporary injunction prohibiting the further showing of the film until further order of the court. A trial judge is authorized to perform this function under the law of Georgia, and we hold that what occurred in this case amounted to an interlocutory judicial determination that the film was obscene. An interlocutory judicial determination that material is obscene is not the equivalent of "probable cause" that material may be obscene.

We acknowledge that interlocutory judicial restraint with respect to a First Amendment claim must be reasonable and should be followed as promptly as is practicable by a final judicial determination of First Amendment issues. We tried to say this as plainly as we knew how in this Court's order of October 1, 1973, denying the motion for supersedeas in this case (See appendix).

But for this Court to hold that a film, judicially determined to be obscene at a preliminary hearing, cannot be suppressed during the pendency of the litigation as to whether it is obscene or not would effectively deny the State the right to suppress the showing of an obscene film. This is so because without the possibility of interlocutory prohibition, a film, ultimately adjudged to be obscene, could be shown during the many

months and years of trial and appellate litigation permitted by our system before a judgment is absolutely final.

Obscenity is not protected by the First Amendment, and after a preliminary judicial determination that material is obscene, such material is not protected during the course of the litigation on its way to a final judgment. In short, we hold that interlocutory judicial restraint of obscene material, with adequate provision being made that First Amendment claims can proceed to final judgment at the earliest practicable date, is not violative of First Amendment rights.

Such safeguards were accorded to the appellants in this case by this Court's order of October 1, 1973 (See appendix).

The judgment rendered by the trial court was correct.

Judgement affirmed. All the Justices concur.

APPENDIX

[Part of Opinion of the Supreme Court of Georgia]

IN THE

SUPREME COURT OF GEORGIA

Decided: October 1, 1973

28400. S.S.W. CORPORATION, et al. v. SLATON

ORDER ON SUPERSEDEAS APPLICATION

Per Curiam. The defendants below have moved in this Court for an order superseding an order entered in the trial court temporarily enjoining the defendants from showing the motion picture "Deep Throat" within the jurisdiction of the trial court pending a final determination in the trial court whether a permanent injunction should or should not be entered.

The temporary injunction sought to be superseded here was entered by the trial court only after an adversary judicial hearing. The trial judge made a preliminary judicial determination that the film is obscene-pornographic as defined by Georgia law, and he therefore temporarily enjoined the defendants from further displaying the film until further order of the trial court.

The purpose of the movant's motion here is to have this Court supersede that temporary injunction so as

to permit the continued showing of the film pending a final judgment in the case.

Action by the State that may constitute "prior restraint" against material that may or may not be protected by the First Amendment is not favored. However, prior judicial restraint, after an adversary hearing, is constitutionally permissible if the material alleged to be protected by the First Amendment is material that is alleged to be obscene and pornographic. But even in such a case prior judicial restraint of a temporary nature must be followed by a final determination of First Amendment issues at the earliest practicable date following the entry of a temporary injunction. Such a reasonable procedure is necessary in order to avoid prior restraint of a temporary nature being used to prolong the final and permanent determination of First Amendment issues raised.

This Court therefore declines to grant the motion for supersedeas in the instant case; but the trial court is directed to place the case at the head of the trial calendar and proceed with a trial that will lead to a final judgment at the earliest practicable date.

If a final judgment in the case has not been entered by the trial court within sixty days from the date of this Order, then this Court will entertain a second motion on the part of the defendants seeking an Order by this Court to supersede the temporary injunction entered by the trial court.

The Clerk of this Court shall serve a copy of this Order upon counsel for the parties and upon the trial judge in the court below.

It is so ordered.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies each of this Supplemental Brief for Appellant upon counsel for Appellee, Mr. William S. Lee, District Attorney, Dougherty County Courthouse, Albany, Georgia 31701, and Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, Atlanta, Georgia 30312, by depositing copies of said Supplemental Brief for Appellant in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery first class.

I hereby certify that all parties required to be served have been served.

This ... day of March, 1974.

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